(11)

No. 95-6-CSX
Status: GRANTED

Title: Norfolk and Western Railway Company, Petitioner
v.
William J. Hiles

Docketed:
June 30, 1995

Court: Appellate Court of Illinois,
Fifth District

Counsel for petitioner: Phillips,Carter G.

Counsel for respondent: Mann,Lawrence M., Sathre,Jeanne

063095 Petr corr as above

Entry	Date	Note	Proceedings and Orders
1	Jun 30 1995	G	Petition for writ of certiorari filed.
2	Jul 31 1995		Brief of respondent William Hiles in opposition filed.
3	Aug 2 1995		Brief amicus curiae of Association of American Railroads filed.
4	Aug 2 1995		DISTRIBUTED. September 26, 1995 (Page 75)
5	Aug 8 1995	X	Reply brief of petitioner filed.
6	Sep 27 1995		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 2995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply.
			**********
7	Nov 1 1995		SET FOR ARGUMENT MONDAY, JANUARY 8, 1996. (1ST CASE).
8	Nov 8 1995		Brief amicus curiae of Association of American Railroads filed.
9	Nov 9 1995		Joint appendix filed.
10	Nov 9 1995		Brief of petitioner Norfolk & Western Railway Company filed.
11	Nov 9 1995		CIRCULATED.
12	Nov 17 1995		Record filed.
		*	Original record proceedings Appellate Court of Illinois, Fifth District and Circuit Court of Madison County (BOX
13	Dec 7 1995		LODGING consisting of two enlarged colored photos submitted by counsel for the petitioner for use during oral argument.
14	Dec 7 1995	X	Brief amicus curiae of United Transportation Union filed.
15	Dec 8 1995	X	Brief of respondent William Hiles filed.
16	Dec 28 1995	X	Reply brief of petitioner Norfolk & Western Railway Company filed.
17	Jan 8 1996		ARGUED.

1PP

No. 95——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a railroad employee who goes between two railroad cars to straighten a misaligned drawbar and is thereby injured is entitled to judgment as a matter of law under the Safety Appliance Act, 49 U.S.C. § 20302(a)(1)(A), even if there is no evidence that the drawbar was defective.

LIST OF PARTIES AND RULE 29.1 LIST

The only parties to this proceeding are the petitioner Norfolk & Western Railway Company and the respondent William J. Hiles.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Norfolk & Western Railway Company states that it is a subsidiary of the Norfolk Southern Corporation.

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IN THE

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No. 95- ——

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norfolk & Western Railway Company respectfully requests that a writ of certiorari issue to review the judgment and decision of the Appellate Court of Illinois, Fifth Judicial District.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fifth District (App. at 1a-7a) is reported at 644 N.E.2d 508. The order of the Illinois Supreme Court (App. at 8a) denying petitioner's petition for leave to appeal is not reported. The judgment of the Circuit Court, Third Judicial Circuit, Madison County, Illinois (App. at 9a-10a) is not reported.

JURISDICTION

The judgment of the Illinois Appellate Court, Fifth Judicial District, was entered on December 29, 1994. App. at 9a-10a. The Illinois Supreme Court entered its Order Denying Petition for Leave to Appeal on April 5, 1995. App. at 8a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

During the period relevant to this case, the federal Safety Appliance Act ("SAA") provided in pertinent part:

> [I]t shall be unlawful for any . . . common carrier [engaged in interstate commerce by railroad] to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U.S.C. § 2.[1]

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[1] Congress revised the provision effective July 5, 1994 and transferred it to 49 U.S.C. § 20302(a), which states in relevant part:

> [A] railroad carrier may use or allow to be used on any of its railroad lines—
>
> (1) a vehicle only if it is equipped with—
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . . .

In amending the statute, Congress expressly provided that it was making "no substantive change in the law" and not "impair[ing] the precedent value of earlier judicial decisions and other interpretations." H.R. Rep. No. 180, 103rd Cong., 2d Sess. 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 822. For convenience, petitioner will refer to the current version of the statute, 49 U.S.C. § 20302(a).

STATEMENT OF THE CASE

1. Respondent William J. Hiles, an employee of petitioner Norfolk & Western Railway Company, was a member of a switching crew at petitioner's Luther Yard in St. Louis, Missouri. His duties at that time included coupling and uncoupling railroad cars.

Railroad cars are joined by couplers located at both ends of all cars. A car's coupling mechanism consists of a knuckle, or a clamp which opens and closes, connected to a heavy drawbar that is fastened to a housing mechanism on the car. To connect two cars, the open knuckle of one car engages the knuckle on another car, and the two cars couple automatically when they come together. Once they are coupled, a worker then secures the knuckle by moving a lever on the side of the car; he can also open a knuckle to uncouple the cars by using that lever.

In order for coupling to take place, the drawbars of the cars must be aligned to connect on impact. If they are not aligned, the knuckles will not contact each other, and the cars will not couple. The drawbar has some horizontal play in order that coupled railroad cars can make turns without derailing, and because of this movement, drawbars may become misaligned, or "slued." When such misalignment occurs, drawbars must be realigned manually. Manual alignment of a drawbar requires the employee to go between the cars; there is no automatic alignment device in common use. See *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823, 831 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Reed* v. *Philadelphia, Bethlehem & New Eng. Ry.*, 939 F.2d 128, 130 (3d Cir. 1991).

On July 18, 1990, respondent was working as a brakeman at petitioner's railyard along with Larry Fauver, a conductor. At approximately 4:00 a.m., respondent was walking along the tracks, examining drawbars to

determine if they were properly aligned, when he noticed a car with a misaligned drawbar. That car was at that time coupled to another car, and Fauver uncoupled the cars. Then both respondent and Fauver went between the two train cars to straighten the misaligned drawbar. Respondent was pulling the drawbar towards him while Fauver was pushing it in an attempt to straighten the bar. Respondent injured his back during this process.

2. Respondent filed suit on December 26, 1991, in the Circuit Court of Madison County, Illinois, alleging only that petitioner violated Section 2 of the federal Safety Appliance Act. See 49 U.S.C. § 20302(a)(1)(A). The SAA makes it unlawful for a railroad to use any car not "equipped with . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles." 49 U.S.C. § 20302(a)(1)(A).[2] Respondent expressly premised his cause of action exclusively on the SAA and included no allegations of negligence that would have triggered independent liability under FELA. Petitioner filed an amended answer, raising the affirmative defense that any improper alignment of the drawbar did not result from defective equipment.

During trial, petitioner filed a Motion for Summary Judgment on liability, arguing that respondent had produced no evidence of a defect in the drawbar alleged to have caused respondent's injury. The court denied this motion. The court also denied petitioner's Motion for Directed Verdict filed at the close of respondent's case and at the close of all evidence. Instead, the court granted respondent's Motion for a Directed Verdict on the issue of petitioner's liability.

Petitioner made an offer of proof of evidence that the misalignment of the drawbar was not caused by a defect

[2] The Federal Employer's Liability Act ("FELA") renders railroads liable for violation of the SAA. 45 U.S.C. § 51.

in the equipment. This offer of proof consisted of the uncontradicted testimony of Walter Miller, general foreman, and Larry Fauver, conductor, and respondent's discovery deposition and certified questions and answers. Miller testified that he inspected the drawbar at 5:40 a.m., approximately one hour and forty minutes after the injury, and found that neither the coupler nor the drawbar were defective. Conductor Fauver testified that at the time he uncoupled the rail cars, the drawbar was improperly aligned. Respondent testified that he was unaware of any defect of the drawbar. The court excluded this evidence as irrelevant to the liability issue under the SAA.

After the court decided liability adversely to petitioner, a trial was conducted on damages. The jury awarded respondent $492,500.00. Judgment was entered against the railroad on May 24, 1993.

3. The Fifth Judicial District of the Appellate Court of Illinois affirmed the Circuit Court on December 29, 1994. The court explicitly recognized its duty to apply federal case law when interpreting the SAA. App. at 4a. Nevertheless, acknowledging expressly the hopeless conflict among the federal circuits, the court followed those federal court cases comporting with Illinois case law interpreting the SAA, see *Buskirk* v. *Burlington N., Inc.*, 431 N.E.2d 410 (Ill. App.), *cert. denied*, 459 U.S. 910 (1982), and affirmed the trial court's judgment. See *Coleman* v. *Burlington N., Inc.*, 681 F.2d 542 (8th Cir. 1982); *Metcalfe* v. *Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892 (10th Cir. 1974). The court declined to revisit Illinois precedent, and held that a railroad is liable as a matter of law when an employee can show that two railroad cars failed to couple automatically, and that an employee went between those cars and was injured while attempting to align a misaligned drawbar. App. at 6a; see *Buskirk*, 431 N.E.2d at 412. The employee, held the court, is entitled to a directed verdict of liability

regardless of whether the coupling equipment was defective. App. at 7a. The Illinois Supreme Court denied review. App. at 8a.

REASONS FOR GRANTING THE PETITION

This case is the most recent of numerous state and federal decisions which are sharply divided in their interpretations of the SAA requirement that railroad cars be equipped with "couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles." 49 U.S.C. § 20302(a)(1)(A). The decision below presents the Court with several compelling reasons for granting certiorari.

First, in direct conflict with the Illinois state court decision here, the Seventh Circuit has held that mere misalignment of drawbars requiring employees to go between cars to manually align them before the cars can automatically couple does *not* trigger strict liability under the SAA. *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823, 831 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995). Accordingly, in federal court the plaintiff's failure to prove a defect is fatal to a claim under the SAA. *Id.* at 831. This direct conflict creates an intolerable situation: the very same suit will succeed as a matter of law in Illinois state courts and fail as a matter of law if filed across the street in a federal court located in Illinois.

Second, the conflict in the proper interpretation of the SAA extends well beyond Illinois. Many other courts, both state and federal, are hopelessly split on the issue of whether a railroad employee going between two railroad cars to straighten a misaligned drawbar and injuring himself constitutes a per se violation of the SAA. The Eighth and Tenth Circuits, along with a significant trend of state courts, hold that misalignment of a drawbar violates the Act. *Coleman*, 681 F.2d 542; *Metcalfe*, 491 F.2d 892; see also, *e.g.*, *Finley* v. *Southern Pac. Co.*,

179 Cal. App. 2d 424 (1960); *Schaaf* v. *Chesapeake & Ohio Ry.*, 317 N.W.2d 679 (Mich. Ct. App. 1982), *cert. denied*, 464 U.S. 848 (1983); *Plouffe* v. *Burlington N., Inc.*, 730 P.2d 1148 (Mont. 1986). In contrast, the Third, Fourth, Fifth, Sixth, and Seventh Circuits hold that if a misaligned drawbar is nondefective, there is no SAA violation. *Reed* v. *Philadelphia, Bethlehem & New Eng. Ry.*, 939 F.2d 128 (3d Cir. 1991); *Goedel* v. *Norfolk & W. Ry.*, 13 F.3d 807 (4th Cir. 1994); *Maldonado* v. *Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994); *Lisek*, 30 F.3d 823.

Third, the decision below, holding that misaligned drawbars are a per se violation of the SAA, incorrectly interprets the statute's requirements, and is unfaithful to this Court's interpretation of the SAA. The Appellate Court's opinion here gives 49 U.S.C. § 20302(a)(1)(A) an unduly sweeping application and improperly applies this Court's decision in *Affolder* v. *New York, Chicago & St. L.R.R.*, 339 U.S. 96 (1950). Accordingly, the decision below should be reviewed and reversed.

Finally, it is important that the Court resolve this recurring and often dispositive issue involving a fundamental statute regulating relations between railroads and their employees. This Court "is the only body capable of resolving conflicts between the various lower courts, both federal and state." *Novack Inv. Co.* v. *Setser*, 454 U.S. 1064, 1064-65 (1981) (White, J., dissenting from the denial of certiorari).

1. Review by this Court is crucial to assure uniformity in the interpretation of federal law. Indeed, "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). Where a state court and a fed-

eral court of appeals covering that same state adopt inconsistent rules of law, review is particularly appropriate to eliminate forum shopping and to avoid the inequitable administration of the laws inherent in having conflicting rules governing the same jurisdiction. *Cf. Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965) (describing the twin goals of the *Erie* doctrine). For this reason, the Court has not hesitated to grant certiorari to resolve such conflicts. See *Madsen* v. *Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2523 (1994); *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1944 (1994); *Hagen* v. *Utah*, 114 S. Ct. 958, 964 (1994); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 299 (1988); *DeCoteau* v. *District County Ct. for the Tenth Judicial Dist.*, 420 U.S. 425, 430-31 (1975); *Thomas* v. *Hempt Bros.*, 345 U.S. 19, 20 (1953).

The instant case would clearly have been decided differently in a federal court located in Illinois than it was in the Illinois state court. If Hiles had filed suit under Section 2 of the SAA in the Southern District of Illinois in East St. Louis, in order to recover he would have been required to prove that there was a defect in the misaligned drawbar, which he made no attempt to do. See *Lisek*, 30 F.3d at 831. However, because Hiles filed suit in state court in Edwardsville, Illinois, just eleven miles from East St. Louis, the mere existence of a misaligned drawbar, defective or not, was declared a per se violation of the SAA. App. at 7a. The outcome of the instant case is particularly intolerable because petitioner in this case, Norfolk & Western Railway, has been forced to defend itself in different courts in Illinois following two opposing interpretations of the same statute. Compare *Lisek*, 30 F.3d 823 with *Hiles* v. *Norfolk & W. Ry.*, App. at 1a-7a.

Lisek and *Hiles* are indistinguishable on their facts. Lisek, a switchman, was checking railroad cars in preparation for coupling them and noticed a misaligned drawbar, as did respondent. Lisek went between the rails to realign the drawbar, and was injured pushing it, as was respondent. *Lisek*, 30 F.3d at 825.

The opinion of the court below acknowledged the conflict with the Seventh Circuit as well as the widespread split on this issue in other courts, and expressly invited review of the question by this Court: "[U]ntil the United States Supreme Court resolves the issue, we will adhere to *Buskirk* and the line of Federal cases upon which it is predicated." App. at 6a. The Court should accept the invitation and grant certiorari to resolve this manifest conflict.

2. There is a significant split among federal circuits on the precise issue raised in this case, and the majority of federal circuits are also split with state courts on the same issue. The decision below conflicts with the overwhelming trend of current federal case law interpreting this provision of the SAA.

Since 1986, every federal court deciding this issue—the Third, Fourth, Fifth, Sixth, and Seventh Circuits—has held that a railroad has not violated the SAA where its coupling equipment was nondefective and operating properly. Under these cases, the existence of a misaligned drawbar does not in itself violate the SAA; the railroad may, as a defense, show that the misaligned drawbar was not defective. *Kavorkian* v. *CSX Transp. Inc.*, 33 F.3d 570 (6th Cir. 1994); *Lisek*, 30 F.3d 823; *Goedel* v. *Norfolk & W. Ry.*, 13 F.3d 807 (4th Cir. 1994); *Reed* v. *Philadelphia, Bethlehem & New Eng. Ry.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado* v. *Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *cf. United Transp. Union* v. *Lewis*, 711 F.2d 233 (D.C. Cir. 1983) (holding that Section 2 of the SAA does not prohibit a certain procedure that requires employees to go between cars because Section 2 is only violated if nondefective equipment does not perform as prescribed).

Another earlier pair of federal cases held that the railroad employee proves a violation of the SAA by showing he went between two cars to align an improperly aligned drawbar. *Coleman* v. *Burlington N., Inc.*, 681 F.2d 542 (8th Cir. 1982); *Metcalfe* v. *Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892 (10th Cir. 1974). State courts have also generally held that a failure to couple because of simple drawbar misalignment constitutes a per se violation of the Act. See *Lisek*, 30 F.3d at 827 (citing cases from California, Illinois, Michigan, Minnesota, Missouri, Montana, New York, and Utah). The state court and minority federal court line of cases plainly conflicts with the more recent line of federal court of appeals decisions.

The recent trend of federal decisions holds that injury due to misalignment of drawbars does not constitute a per se violation of the SAA, and a railroad is permitted to prove in its defense that the misalignment was not caused by defective equipment. In cases in this line where there was a failed attempt at coupling, the courts have held that a failure to couple caused by a nondefective misaligned drawbar does not trigger absolute liability under the SAA. *Kavorkian*, 33 F.3d 570; *Reed*, 939 F.2d 128; *Maldonado*, 798 F.2d 764; *Towles* v. *Burlington N.R.R.*, No. CS-93-270-JBH, 1994 WL 151073 (E.D. Wash. Apr. 20, 1994).

In *Kavorkian*, the Sixth Circuit held that a railroad will not be liable under the SAA for injuries proceeding from failed coupling due to misaligned drawbars. *Kavorkian*, 33 F.3d at 576. Any danger workers face in realigning a nondefective drawbar is beyond the scope of the statute. *Id.* at 575. Similarly, the Third Circuit in *Reed* held that where misaligned drawbars fail to couple, a railroad will not be liable if it can show that the equipment was not defective. *Reed*, 939 F.2d at 128, 132. A mere failure to couple does not violate the SAA. *Id.* at 132. The Appellate Court in this case expressly

acknowledged that its holding conflicted with these decisions.

The two cases where there was no pre-injury attempt to couple the cars also held that misalignment of nondefective drawbars does not violate the SAA. The Seventh Circuit's recent opinion in *Lisek* held that "the mere existence of a misaligned drawbar cannot trigger the railroad's absolute liability." *Lisek*, 30 F.3d at 831. Similarly, the Fourth Circuit in *Goedel* held that a failure of nondefective drawbars to couple automatically does not violate the SAA; a misaligned coupler alone does not violate the Act. *Goedel*, 13 F.3d at 812.

In sum, there exists a concrete conflict between state courts and a majority of the federal circuits as well as an acknowledged federal circuit split concerning the correct interpretation of Section 2 of the SAA, *viz.*, whether there is a violation of the SAA when an employee goes between two cars to align a drawbar where the equipment is nondefective. This Court should grant the petition and establish a uniform interpretation of this provision to create much-needed consistency among lower state and federal courts.

3. The Illinois Appellate Court misinterpreted 49 U.S.C. § 20302(a), as well as this Court's precedent, in holding that a railroad could not present a defense that a misaligned drawbar was nondefective where an employee was injured between two cars realigning the drawbar. That error reinforces the propriety of this Court's review.

The SAA is an equipment safety statute. *Maldonado* v. *Missouri Pac. Ry.*, 798 F.2d 764, 768 (5th Cir. 1986); *United Transp. Union* v. *Lewis*, 711 F.2d 233, 243-44 (D.C. Cir. 1983); *Towles* v. *Burlington N.R.R.*, No. CS-93-270-JBH, 1994 WL 151073, at *8 (E.D. Wash. Apr. 20, 1994). Section 2 only serves to require certain mandatory equipment and does not prescribe operating procedures: the plain language of the statute

simply requires that cars must be equipped with automatic couplers of the type that will couple without railroad workers having to go between the ends of the cars. 49 U.S.C. § 20302(a). The statute "does not separately prohibit the act of going between cars" to deal with an operational problem with equipment that otherwise complies with the statute. *United Transp. Union*, 711 F.2d at 251. Respondent does not dispute that such couplers, in fact, were in place on both cars at issue in this case. A railroad, then, cannot be strictly liable under the SAA when its cars are furnished with nondefective equipment. *Towles*, 1994 WL 151073, at *8.

It is inevitable that nondefective railroad car couplers will, on occasion, be misaligned. *Goedel*, 13 F.3d at 812. This Court has recognized that "[s]ome lateral play must be allowed to drawheads . . . ." *Atlantic City R.R.* v. *Parker*, 242 U.S. 56, 59 (1916). To ensure that railroad cars do not derail on curves, it is a practical necessity that the cars' drawbars have some lateral play. *Goedel*, 13 F.3d at 812. Additionally, "a drawbar frequently becomes misaligned by the normal jarring and vibrations of the railroad car or when the car is uncoupled on a different track, to such a degree that coupling can not occur without realignment." *Kavorkian* v. *CSX Transp., Inc.*, 33 F.3d 570, 575 (6th Cir. 1994); *United Transp. Union*, 711 F.2d at 235 & n.5. No nonmanual method currently exists for aligning misaligned drawbars. In drafting the SAA, Congress could not have intended to mandate the use of equipment unavailable at that time, let alone so uncommon a century later. *Lisek*, 30 F.3d at 831. To the extent that the railroad is negligent in failing to correct an equipment malfunction, it may be liable under the FELA, 45 U.S.C. § 51, a claim respondent did not raise in his complaint. But the railroad is not strictly liable under the SAA if the proper equipment is in place.

Interpreting the statute as the lower court has here imposes the impossible standard that a railroad is liable

for any injury incurred when an employee straightens a drawbar misaligned in the ordinary use of the car. "[T]he Safety Appliance Act was created to reduce the risks associated with coupling rail cars and not to require that drawbars be aligned perfectly at all times." *Goedel*, 13 F.3d at 812. The SAA cannot place absolute liability on a railroad merely because a drawbar is slued, or misaligned, particularly because there is no device currently in use that will automatically straighten misaligned drawbars. The Seventh Circuit declared that "[i]f it is normal for nondefective automatic couplers to become misaligned as a part of ordinary railyard operations, then it is simply not reasonable to hold that such misalignment amounts to a violation of the Act." *Lisek*, 30 F.3d at 830-31. Such a result would be worse than unreasonable; the Seventh Circuit explicitly refused to "accept[] a reading of section 2 that would be tantamount to a pronouncement that 99% of all railroad cars violate section 2—and have done so for the entire 90 years the Act has been in effect." *Id.* at 831 (quoting *United Transp. Union*, 711 F.2d at 251 n.39).

This understanding of the Act was adopted by the Court in *Affolder* v. *New York, Chicago & St. L.R.R.*, 339 U.S. 96 (1950). There, the Court held that a plaintiff under Section 2 of the SAA did not have to show a defect if the coupler did not perform properly. *Id.* at 99. The Court also held, however, that the railroad had a good defense to absolute liability under the SAA if both knuckles, or clamps at the ends of drawbars, were closed at the time of impact and the cars failed to couple. In order for the railroad to be liable for injuries caused by the failure to couple, the coupler must have been set properly. Justice Jackson, dissenting on the issue of the jury instruction below but agreeing with the majority on the law, stated: "Before a failure to couple establishes a defective coupler, it must be found that it was properly set so it could couple. If it was not adjusted as such automatic couplers must be, of course the failure is not

that of the device." *Id.* at 101 (Jackson, J., dissenting); see also *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434 (1949) ("[T]he absence of a 'defect' cannot aid the railroad if the coupler was properly set and failed to couple on the occasion in question.").

While *Affolder* held that closed knuckles meant a coupler was not properly set and the railroad was therefore not liable, the Court did not reach the question of whether drawbar misalignment, another common cause of failed coupling, constituted a per se violation of the SAA. The *Affolder* exception to absolute liability under the SAA, requiring that couplers be "properly set," applies equally to misaligned drawbars as well as to unopened knuckles. As the Third Circuit stated in *Reed*, "[i]n both instances, the causative factor which prevents the coupling may result from jarring or vibration of the car while moving, or from human error in failing to open the knuckle or align the drawbar." *Reed* v. *Philadelphia, Bethlehem & New Eng. Ry.*, 939 F.2d 128, 132 (3d Cir. 1991); see *Kavorkian*, 33 F.3d at 575.

Because the *Affolder* defense of defective equipment logically extends to misaligned drawbars, the Illinois Appellate Court was wrong in holding petitioner per se liable. The lower court's opinion should be reversed and therefore certiorari should be granted.

4. Federal and state courts have demonstrated a pressing need for guidance on this fundamental, disputed question affecting liability on a daily basis for all railroads. This is no obscure legal issue of merely academic interest. The very same question has arisen repeatedly across the nation in railroad litigation, including twice at the federal court of appeals level quite recently. See *Kavorkian*, 33 F.3d 570; *Goedel*, 13 F.3d 807. The issue will unquestionably recur; railway employees surely will continue to sue railroads under the SAA for injuries incurred while manually aligning drawbars.

Additionally, the issue is a significant one because it is dispositive of the case when, as here, it is misapplied. If a court follows the holding of the opinion below and the Eighth and Tenth Circuits, a railroad employee will succeed *as a matter of law* when he goes between two railroad cars to straighten a misaligned drawbar and is injured, regardless of any evidence of defective equipment. If a court follows the more recent and unbroken line of federal court of appeals cases, however, the railroad will prevail *as a matter of law* if the employee shows no evidence that the equipment was defective. For the outcome of cases under this statutory provision to depend so completely on fortuity of the forum in which the suit is brought is absolutely untenable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 30, 1995

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APPENDICES

APPENDIX A

[Filed Dec. 29, 1994]

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-93-0775

WILLIAM J. HILES,
Plaintiff-Appellee,
v.

NORFOLK AND WESTERN RAILWAY COMPANY,
a Corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Madison County.
No. 91-L-1605
Honorable Phillip J. Kardis, Judge, presiding

JUSTICE WELCH delivered the opinion of the court:

On December 26, 1991, William J. Hiles (plaintiff), filed a one-count complaint against the Norfolk & Western Railway Company (defendant) in the circuit court of Madison County. Plaintiff brought his action under the Federal Safety Appliance Act (Safety Appliance Act) (45 U.S.C.S. sec. 1 *et seq.* (Law. Co-op 1981 & Supp. 1994)). In relevant part, it was alleged:

> "3. That on July 18, 1990, the plaintiff * * * was working as a member of a switching crew located at Defendant's St. Louis Yard, at or near St. Louis,

> Missouri. At that time, in the course and scope of his duties, he was required to go between two railroad cars to straighten a misaligned draw bar and was injured attempting to "straighten" said drawbar, all in violation in whole or in part of the aforesaid Safety Appliance Act."

On May 20, 1993, defendant filed an amended answer raising, *inter alia*, the affirmative defense that "plaintiff's claim that the drawbar or coupler was not aligned was a result of simple misalignment and not the result of defective equipment." Also on May 20, 1993, defendant filed a motion for summary judgment and a supporting memorandum of law. In pertinent part, defendant's memorandum states:

> "Plaintiff has filed a cause of action for injuries allegedly resulting from realigning a drawbar between rail cars. Plaintiff * * * has not presented any evidence of a defective drawbar or coupler system. Plaintiff claims per se liability under the Federal Safety Appliance Act based on a slewed drawbar.
>
> [Defendant] has clearly established, through the Affidavit of General Foreman Walter A. Miller, Jr., the drawbar and coupler involved in the subject occurrence were not defective at the time of plaintiff's alleged injury. This evidence is uncontested.
>
> If [defendant] can prove the slewed drawbar was cause [*sic*] by something other than defective equipment, it will avoid liability under the Safety Appliance Act."

The trial court denied defendant's motion for summary judgment. Relying on *Buskirk v. Burlington Northern, Inc.* (1982), 103 Ill. App.3d 414, 431 N.E.2d 410 (railroad held liable as a matter of law under the Safety Appliance Act where employee went between railcars and injured his back while struggling to realign

a drawbar that had failed to automatically couple), plaintiff filed a motion for directed verdict on May 20, 1993. According to plaintiff, the evidence was uncontradicted that "he went between two cars which failed to couple automatically and * * * while aligning a misaligned drawbar, he was injured." As a result, plaintiff concluded that he was entitled to a directed verdict based upon this court's *Buskirk* decision.

The trial court agreed and granted plaintiff's motion for a directed verdict on the issue of liability. Defendant made an offer of proof that consisted of the testimony of two employees. Walter Miller, a general foreman, stated that his inspection did not reveal any kind of mechanical defect in the drawbar on the car involved in plaintiff's injury. Larry Fauver, a switchman who was working with plaintiff at the time of the injury, stated that the drawbar was slued. Defendant also submitted plaintiff's discovery deposition and certified questions and answers in support of the offer of proof.

On May 21, 1993, defendant filed a motion for a directed verdict at the conclusion of all the evidence. The trial court denied the motion, and the jury returned a verdict in favor of plaintiff. Defendant's posttrial motion was denied on October 21, 1993.

On appeal, defendant argues that the trial court erred: (1) by allowing plaintiff to present evidence of a *per se* violation of the Safety Appliance Act without requiring a showing of a defect in the drawbar or coupler and further erred by directing a verdict in favor of the plaintiff on the issue of liability; and (2) when it improperly excluded evidence that the misaligned drawbar was not caused by defective equipment or that it was caused by something other than defective equipment and further erred by denying the defendant's motions for directed verdict on the issue of its liability under the Safety Appliance Act. We disagree.

The operative section of the Safety Appliance Act upon which this case was tried makes it "unlawful for any such railroad [engaged in interstate commerce by railroad] to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." (45 U.S.C.S. sec. 2 (Law. Co-op Supp. 1994).) The purpose of section two is "to obviate the risks to employees by reason of their going between railroad cars to manually couple and uncouple them." *Leveck v. Consolidated Rail Corp.* (1986), 148 Ill. App.3d 118, 123, 498 N.E.2d 529, 532.

To get an idea of how the mechanics of "coupling" operate, we quote the following explanation:

> "Each rail car has a coupling mechanism located on each end which allows cars to be connected with other cars. The standard coupling mechanism consists of a knuckle attached to a drawbar. The drawbar is in turn attached to the rail car. The knuckle is a clamp which can be opened and closed as required and is designed to couple automatically with another knuckle on impact when the couplers are properly aligned. The drawbar has several inches of lateral play so that the rail cars can negotiate turns without derailing. However, because of the lateral play, the knuckles occasionally become misaligned and may fail to couple automatically upon impact. No device has been developed for widespread use that would automatically align the drawbars." *Goedel v. Norfolk & Western Ry. Co.* (4th Cir. 1994), 13 F.3d 807, 809.

It is well established that in construing the Federal Employer's Liability Act and the Safety Appliance Act, as with other Federal statutes, this court must look to Federal decisions for guidance and interpretation. (See, *e.g., Bailey v. Central Vermont Ry., Inc.* (1943), 319

U.S. 350, 352, 87 L.Ed. 1444, ——, 63 S. Ct. 1062, 1063; *Boyer v. Atchison, Topeka & Santa Fe Ry. Co.* (1967), 38 Ill.2d 31, 34, 230 N.E.2d 173, 176; *Templeton v. Chicago & Northwestern Transportation Co.* (1991), 211 Ill. App.3d 489, 495, 570 N.E.2d 467, 471, *rev'd on other grounds* (1992), 151 Ill.2d 325, 603 N.E.2d 441.) Two purposes are served by a rule requiring application of Federal decisional law: (1) preventing the erosion of rights conferred by Federal law and (2) achieving uniformity. *Bowman v. Illinois Central R.R. Co.* (1957), 11 Ill.2d 186, 226, 142 N.E.2d 104, 127.

At the outset, we note that there is no uniformity in the case law on the issue of whether a misaligned drawbar, absent evidence of defective coupling equipment, constitutes a violation of the Safety Appliance Act. "The malfunctioning and misalignment of rail car couplers has received varied treatment from the federal courts over the years." (*Goedel*, 13 F.3d at 810.) There are two lines of cases addressing this issue.

Under one line of cases, there is no violation of the Safety Appliance Act if the coupling equipment is nondefective. Thus, the existence of a misaligned drawbar, in the absence of proof of defective coupling equipment, is not a violation of the Safety Appliance Act. *Kavorkian v. CSX Transportation, Inc.* (6th Cir. 1994), 33 F.3d 570, ——; *Lisek v. Norfolk & Western Ry. Co.* (7th Cir. 1994), 30 F.3d 823; *Goedel*, 13 F.3d at 811-12; *Reed v. Philadelphia, Bethlehem & New England R.R. Co.* (3d Cir. 1991), 939 F.2d 128, 132; *Maldonado v. Missouri Pacific Ry. Co.* (5th Cir. 1986), 798 F.2d 764, 768.

Under the second line of cases, to which two Federal circuits currently adhere, a railroad is liable for injuries under the Safety Appliance Act when cars fail to automatically couple due to a misaligned drawbar. (*Coleman v. Burlington Northern, Inc.* (8th Cir. 1982), 681 F.2d 542, 544-45; *Metcalfe v. Atchison, Topeka & Santa Fe*

Ry. Co. (10th Cir. 1974), 491 F.2d 892, 896-97; *Kansas City Southern Ry. Co. v. Cagle* (10th Cir. 1955), 229 F.2d 12, 14-15.) As the Seventh Circuit recently observed in *Lisek*, "The state courts have * * * overwhelmingly held that a failure to couple due to drawbar misalignment constitutes a violation of the [Safety Appliance Act]." *Lisek*, 30 F.3d at 827 (citing cases from California, Illinois, Michigan, Minnesota, Missouri, Montana, New York, and Utah).

This court has repeatedly held that a railroad is liable as a matter of law under the Safety Appliance Act when an employee goes between railcars and is injured while attempting to force back into position a drawbar that has failed to automatically couple, regardless of whether the coupling equipment is defective. *Pry v. Alton & Southern Ry. Co.* (1992), 233 Ill. App.3d 197, 214, 598 N.E.2d 484, 496; *Leveck*, 148 Ill. App.3d at 123, 498 N.E.2d at 532; *Reynolds v. Alton & Southern Ry. Co.* (1983), 115 Ill. App.3d 88, 95, 450 N.E.2d 402, 408; *Buskirk*, 103 Ill. App.3d at 415, 431 N.E.2d at 412.

The principal question in this case is whether this court should, as defendant suggests, abandon our long-standing authority permitting a plaintiff such as Hiles to recover under the Safety Appliance Act for injuries sustained while attempting to align a misaligned drawbar. Having carefully considered all the applicable cases and the arguments advanced by the parties, we decline defendant's invitation to overrule *Buskirk*.

There is currently no uniformity among the Federal circuits on the question raised in this case. We are not required, as defendant intimates throughout its brief, to follow the rule enunciated by the Third, Fourth, Fifth, Sixth, and Seventh Circuits. Until such time as the Eighth and Tenth Circuits overrule *Coleman* and *Metcalfe*, or until the United States Supreme Court resolves the issue, we will adhere to *Buskirk* and the line of Federal cases upon which it is predicated.

Because we have resolved the first issue in plaintiff's favor, the outcome of the second issue is preordained. Plaintiff was entitled to a directed verdict on the issue of liability. (See *Reynolds*, 115 Ill. App.3d at 95, 450 N.E.2d at 408; *Buskirk*, 103 Ill. App.3d at 415, 431 N.E.2d at 412.) All a plaintiff such as Hiles is required to show in order to obtain a directed verdict on the issue of liability is that: (1) railroad cars failed to couple automatically and (2) he went between the cars and was injured while trying to straighten a misaligned drawbar. (*Buskirk*, 103 Ill. App.3d at 415, 431 N.E.2d at 412.) Plaintiff met these requirements in the instant case and was thus entitled to a directed verdict. Based upon our review of the record, the trial court did not err in granting a directed verdict on the issue of liability. See *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill.2d 494, 510, 229 N.E.2d 504, 513-14 (directed verdict is proper only when all of the evidence, viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on the evidence could ever stand).

For the aforementioned reasons, we hereby affirm the judgment entered by the circuit court of Madison County.

Affirmed.

GOLDENHERSH and LEWIS, JJ., concur.

APPENDIX B

78564

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
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April 5, 1995

Mr. Kurt E. Reitz
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No. 78564—William J. Hiles, respondent, v. Norfolk and Western Railway Company, etc., petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 27, 1995.

APPENDIX C

[Filed May 24, 1993]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

91-L-1605

WILLIAM J. HILES,
Plaintiff,

-vs-

NORFOLK & WESTERN RAILWAY CO.,
a Corporation,
Defendant.

JUDGMENT

This cause called for jury trial May 17, 1993, all parties present with respective counsel, a jury was duly selected and sworn. Sworn testimony and evidence was submitted on behalf of all parties.

The jury returned its verdict, to-wit:

> "We, the jury, find for the plaintiff, William Hiles, on his complaint and against the Defendant, Norfolk & Western Railway Company. We assess the plaintiff's damages in the sum of $492,500.00, itemized as follows:
>
> Disability $100,000.00
> Past & Future Pain and Suffering $57,500.00
> Past Lost Wages $100,000.00
> Future Lost Wages $235,000.00
> TOTAL: $492,500.00"

Judgment on the verdict is hereby entered as follows:

Judgment entered in favor of the plaintiff William Hiles, against the defendant Norfolk & Western Railway Company for $492,500.00 plus the costs of this action.

The clerk is directed to mail copies of this Judgment to all counsel of record.

Dated this 24th day of
May, 1993.

/s/ Phillip J. Kardis
PHILLIP J. KARDIS
Circuit Judge

(2)

No. 95-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a railroad car on which the drawbar is so misaligned as to prevent automatic coupling violates Section 2 of the Safety Appliance Act (49 U.S.C. § 20302 (a)(1)(A)).

LIST OF ALL PARTIES & RULE 29.1 LIST

The only parties to this proceeding are the:

Petitioner: Norfolk & Western Railway Company

Respondent: William J. Hiles

The Petitioner Norfolk & Western Railway Company is a subsidiary of the Norfolk Southern Corporation.

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---

BRIEF IN OPPOSITION

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT A MAJOR SAFETY ISSUE

The Petitioner depicts this litigation as one having a major safety impact in the rail industry. We agree that the case involves a disputed interpretation of the Safety Appliance Acts ("SAA" or "Act"), but it impacts very few accidents or incidents. In 1993, based on the most recent published FRA statistics, only 6 employees were injured in the railroad industry while adjusting a coupler, and there was one death.[1] During the same time period

---

[1] Source: Accident/Incident Bulletin No. 162, Calendar Year 1993, U.S. Dept. of Transportation, Tables 66 and 67. (June 1994). There was one unrelated additional injury resulting from a coupler drawhead broken or defective, which did not involve a coupling or uncoupling procedure. *Id.*, Table 63.

there were a total of 15,363 injuries to railroad employees on duty, and 47 killed.[2] When the law was passed in 1893, there were 9,063 coupling casualties. In each casualty in 1993 there was movement of cars which occurred while the employee was attempting to adjust the coupler. In this case no movement of cars occurred. The undersigned presumes at least some of these 7 casualties resulted from defective couplers. Therefore, only a very few cases would ever have this issue brought before a court. While each injury and death is significant, certainly to the persons involved, casualties from adjusting couplers are not a major nationwide concern.

II. THE SAA WAS CORRECTLY INTERPRETED BY THE LOWER COURT

The petitioners argue that the plaintiff in a SAA case must prove that an actual defect exists before there can be a violation.[3] That analysis is inaccurate by a plain reading of the statute, its intent, and the legislative history.

A. The words of the SAA do not state that the coupler must be defective in order for there to be a violation. This conclusion was reached by the Court in *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 99 (1949). If the couplers do not couple automatically by impact (for whatever reason whether defective or not) or cannot be uncoupled without the necessity of men going between the ends of cars, then the SAA is violated. By comparison, Congress in the Locomotive Boiler Inspection Act, originally enacted in 1911 at 45 U.S.C. §§ 22-34 specifically required that the locomotive be "in proper condition and safe to operate" (45 U.S.C. § 23). The codified provision carries forward the same phraseology. (49 U.S.C. § 20701(1)).[4] When adopting the LBIA Congress was

[2] *Id.*, Table 9.

[3] The SAA was originally codified at 45 U.S.C. §§ 1-16.

[4] The SAA and LBIA are the two basic substantive statutes covering freight cars and locomotives.

certainly aware of its different language used in the SAA. In the SAA Congress did not require that the couplers be defective. Rather, they must couple and uncouple automatically whether defective or not. However, in the LBIA the locomotive has to be in proper condition and safe to operate.

B. The Court stresses the importance of statutory policy. See *Bruce Babbitt, et al. v. Sweet Home Chapter of Communities For A Great Oregon, et al.*, 63 U.S.L.W. 4665, 4668 (June 27, 1995). A host of cases have made it clear that the prime purpose of the SAA is the protection of employees from injury or death. See *B. & O. R.R. v. Jackson*, 353 U.S. 325 (1957); *Gentle v. Western & A. R.R.*, 305 U.S. 654 (1939); *San Antonio, etc. R.R. v. Wagner*, 166 S.W. 24, *aff'd*, 241 U.S. 476, 484 (1916); *Southern Pacific v. Mahl*, 406 F.2d 1201, 1203 (5th Cir. 1969); *Buskirk v. Burlington Northern*, 431 N.E. 2d 410, 412 (Ill. 1982), *cert. denied*, 459 U.S. 910; *McGee v. Burlington Northern*, 571 P. 2d 784 (Mont. 1977); *Henwood v. Gary*, 196 S.W. 2d 958 (Tex. 1946); *Crabtree v. Kurn*, 173 S.W. 2d 851 (Mo. 1943); *Tipton v. Atchison, Topeka & Santa Fe, R.R.*, 78 F.2d 450 (9th Cir. 1935), *aff'd*, 298 U.S. 141 (1936); *Pry v. Alton & Southern R.R.*, 598 N.E. 2d 484, 500 (Ill. 1992). The object of the SAA, being remedial and humanitarian, should not be construed as to defeat the above purpose. This certainly would result if the Petitioner's views were adopted.

C. The legislative history fortifies the statutory provision that it is not necessary to prove a defect for a violation of the SAA to occur. Congress in the automatic coupler provision wanted one result—to obviate the necessity of men going between cars. H.R. Rep. 1678, 52nd Cong., 1st Sess. 3 (1892). There is not one word in the report, nor the Congressional floor debate, to the effect that the coupler must be defective before a violation exists. The Petitioner undertakes a selective analysis into the legis-

lative history in which it ignores the central policy expressed throughout the SAA—to protect the worker.

It is a seminal rule of statutory construction that "[i]n construing any congressional enactment it is necessary to interpret the meaning of the words as they are used in relation to the setting in which they were written, with due regard to the mischief which the legislation was designed to remedy." *Scott v. Moore*, 640 F.2d 708, 727 (5th Cir. 1981); See, *Kokoszka v. Belford*, 417 U.S. 642 (1974); *reh. denied*, 419 U.S. 886 (1974).

Congress was certainly cognizant of the problem and wanted to eliminate the possibility of casualties resulting from persons placing themselves between ends of cars. The following exchange between the author of the bill which became 45 U.S.C. § 2 [5] and the Chairman of the Interstate Commerce Committee in the Senate hearings illustrates this concern:

> The CHAIRMAN. Suppose your bill, Senate bill 1618, were passed and becomes a law. Will there be, under any circumstances, any necessity for a switchman *to go between the cars at all* in order to couple or uncouple the cars?
>
> Mr. RODGERS. . . . The law provides that there shall not be. They have to adopt a coupler with such details that it will not. . . .
>
> . . . .
>
> There is a number of devices that enable this uncoupling to take place from the *side of the car*, and it is better that it should be. (Emphasis Added).

S. Rep. No. 1049, 52d Cong., 1st Sess. 15 (1893).[6]

Congress determined that language prohibiting going between cars was necessary above and beyond the requirement that all cars be equipped with automatic coupling devices.

[5] Currently codified at 49 U.S.C. § 20302(a)(1)(A).

[6] The Senate hearings were annexed as part of the Senate Report.

Congress was concerned about the hazards of going between the ends of the cars to effect coupling or uncoupling even with the already-in-use automatic coupling systems. It is for that reason that the enactment of 45 U.S.C. § 2 contained not only a requirement that cars be equipped with automatic couplers, but also a prohibition against going between cars even so equipped. Even the industry spokesperson acknowledged that the intent of the legislation was to protect the worker from personal injury. The interpretation taken in recent years by the railroads and in this litigation is different from what the industry represented to Congress.

Mr. Haines, Vice-president of the American Railway Association (predecessor to the Association of American Railroads) stated the problem succinctly in testimony during the 1892 hearings:

> . . . I understand the tendency of the legislation to be of a most laudable character and one in which we are a most laudable character and one in which we are entirely in accord, and that is that this committee desires to consider the proposed bills before them with reference to the safety of the men who use these couplers. That is the aspect of the case to which I propose to refer—the possibilities of legislation. It is not a question as to whether we should have a uniform coupler or not. *The question is whether we shall have that kind of coupler which will protect men's lives and protect them from personal injury, and that is the yardstick that is to be applied to all proposed legislation.* (Emphasis Added).

S. Rep. No. 1678, *supra* at 40.

As Mr. Haines further testified:

> What we all want . . . and what this committee wants is a coupler which can be used without danger to the life or to the limb of the man who manipulates it.
>
> . . . .

> What the man who manipulates the coupler wants is that every coupler . . . shall have what we call the release rod, that controls the locking device, so arranged that he can stand *outside* of that car and operate it. *Id.* (Emphasis Added).

The couplers today are engineered significantly better than existed in 1893 when the SAA was enacted. Congress at the time was interested in eradicating the loss of life and injuries resulting not only from defective couplers, but couplers failing to couple automatically for any reason. This is the only way employees would be fully protected and certainly what Congress intended. To carve out an exception to the protection of employees 102 years later we submit would be unconscionable.

III. THE CONFLICTS IN THE COURTS ARE NOT SIGNIFICANT

The Respondent acknowledges that there is a conflict between various courts on the issue regarding the need to prove that a defect exists under the automatic coupler provision of the SAA. We submit that fact alone does not justify granting certiorari here. As pointed out earlier, based on the latest available figures, only six employees were injured in 1993 as a result of coupling or uncoupling.

The Court has reviewed § 2 of the SAA a limited number of times. In each case it upheld the basic purpose of the Act to protect an employee from having to go between cars to assist in coupling or uncoupling. However, the Court has never specifically addressed the issue of whether a misaligned drawbar which causes the railroad car not to couple is a violation of § 2 of the SAA.

In *Affolder v. New York, Chicago & St. Louis R.R., supra,* the Court held that a car which failed to perform properly in a switching operation was a violation of the Act. 339 U.S. at 99. The only condition upon which a carrier could avoid liability is if the coupler had not

been properly opened. *Id.* The Court pointed out that the plaintiff did not have to show a *bad* condition of the coupler. 339 U.S. at 98. In *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430 (1949), the Court held that the absence of a defect cannot aid the railroad if the coupler was properly set and failed to couple. 338 U.S. at 433-434. The Court said:

> This Court has repeatedly attempted to make clear that this is an absolute duty unrelated to negligence, and that the absence of a 'defect' cannot aid the railroad if the coupler was properly set. *Id.*

In *Atlantic City R.R. v. Parker,* 242 U.S. 56 (1916), an employee was injured while straightening a drawbar.[7] There the Court said that:

> [i]f couplers failed to couple automatically upon a straight track, it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law. *Id.* at 59.

In *Johnson v. Southern Pacific R.R.*, 196 U.S. 1 (1904), a plaintiff in the process of straightening a drawbar was injured because the couplers on the two cars to be joined were not compatible with one another. The Court made it clear that the concluding phrase in Section 2 applies to both coupling and uncoupling.

Furthermore, recognition of the split in various courts will likely prompt most attorneys to allege additionally a separate count under FELA that the railroad failed to provide a safe place to work, irrespective of the SAA. This would further minimize the need for the Court to accept certiorari.

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[7] *San Antonio & A.P. R.R. v. Wagner,* 241 U.S. 476 (1916) is inapposite to the present case because in *Wagner* there was evidence of defective equipment. See also *O'Donnell v. Elgin, J. & E. R.R.*, 338 U.S. 384 (1949).

If a significant safety problem develops, Congress is the appropriate vehicle for amending this section of the law.

CONCLUSION

For all the reasons stated herein, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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July 31, 1995

* Counsel of Record

(3)

No. 95-6

IN THE
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NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

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Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

---

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August 8, 1995

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TABLE OF AUTHORITIES

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---

REPLY BRIEF OF PETITIONER

In its Opposition, respondent makes no effort to dispute petitioner's contention that this Court should grant certiorari to resolve the substantial, recurring conflict among state and federal courts over the interpretation of a provision of the federal Safety Appliance Act ("SAA"). Indeed, respondent does not even bother to discuss the hopelessly tangled case law interpreting 49 U.S.C. § 20302(a)(1)(A). This decisional conflict is reason enough for the Court to grant the petition and decide whether the SAA has been violated when a railroad employee is injured going between two cars to align a drawbar where the equipment is not defective.

Respondent offers three justifications for ignoring the conflict among the circuits and between federal and state courts: 1) the decision below is a correct interpretation of the language, history and policy of the SAA; 2) the decision below is consistent with the teachings of this Court interpreting the statute; and 3) the statutory issue is not sufficiently important to warrant this Court's review because only a handful of people die or suffer serious injuries annually as a result of misaligned drawbars. Each of these points merits a brief reply.

1. At the outset, it is worth noting that respondent's arguments on the merits are premature at the certiorari stage. The fact that five circuits have adopted petitioner's interpretation should be sufficient to demonstrate that, at a minimum, the merits are not so one-sided as to justify ignoring the conflict in the circuits. Nevertheless, the Court should recognize that respondent's statutory analysis is seriously flawed.

First, respondent's "plain meaning" argument is conspicuously unaccompanied by any quotation from the statutory language. Opp. 2-3.[1] He certainly makes no effort to respond to petitioner's argument that the statute is concerned with equipment and *not* operating procedures. Pet. 11-12.

Respondent also fails to address the fact that under his interpretation, nearly every railroad has been in violation of the SAA since the day it was enacted, see *Lisek*

[1] Respondent does quote the Locomotive Boiler Inspection Act ("LBIA"), 45 U.S.C. §§ 22-34, a statute passed over 15 years after passage of the SAA, which is inapposite. *See* Opp. 2-3. The two provisions of the LBIA and the SAA that respondent compares regulate vastly different subjects. The SAA provision mandates the type of equipment required—*i.e.*, automatic couplers—while the LBIA provision is explicitly a safety statute, regulating unsafe locomotives and appurtenances and not requiring any particular type of equipment. *Compare* 49 U.S.C. § 20302(a)(1)(A) *with* 49 U.S.C. § 20701(1).

v. *Norfolk & W. Ry.*, 30 F.3d 823, 831 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995), which is at a minimum implausible. Respondent merely states that couplers today are made much better than they were when the SAA was enacted, Opp. 6, but does not (and cannot) argue that the couplers most railroads use will consistently remain aligned during the ordinary use of the railroad car, ensuring that no employees must ever go between cars.

Finally, respondent insists that this Court "stresses the importance of statutory policy," Opp. 3, in interpreting statutes. In fact, this Court has consistently held that "policy" is not a trustworthy guide to statutory interpretation because Congress never pursues "its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."); see also *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1508 (1994) ("Statutes are seldom crafted to pursue a single goal."); *Central Bank, N.A.* v. *First Interstate Bank, N.A.*, 114 S. Ct. 1439, 1454 (1994) (holding that "purpose" arguments are insufficient to support expansive interpretation of federal securities laws). Complex legislation, such as the Safety Appliance Act, cannot be interpreted solely according to one simplistic policy; otherwise, the SAA's strict liability would apply to all injuries, and the FELA's negligence standard would be supplanted to ensure recoveries for all accidents.

2. The Court's holding in *Affolder* v. *New York, Chicago & St. Louis Railroad*, 339 U.S. 96 (1950), upon which respondent relies heavily, is ambiguous as to what the SAA requires in this case. Respondent admits that *Affolder* holds that a carrier has a defense to liability under the SAA if couplers that failed to perform properly were not correctly opened before the attempt to couple. *Affolder*, 339 U.S. at 99, 101; see Opp. 6-7. The logic of that defense seemingly applies in misaligned drawbar

cases such as this one, and two circuits have so interpreted *Affolder*. See *Kavorkian* v. *CSX Transp., Inc.*, 33 F.3d 570, 575 (6th Cir. 1994); *Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 132 (3d Cir. 1991).

3. Contrary to respondent's assertions, the issue presented, albeit narrow, has significant and recurring practical importance. Respondent rather ghoulishly suggests that this case is not worthy of review because not enough people are killed or injured each year straightening drawbars between railroad cars to make the issue important. See Opp. 1-2, 6.[2] This is a rather macabre and unduly narrow standard of importance. Perhaps if large numbers of railroad employees died each year from drawbar alignment situations, that would be a singularly compelling reason to hear this case. Respondent's novel morbidity and mortality standard ignores the more fundamental point, which is that this issue is clearly recurring and has arisen with frequency in both state and federal courts.[3] The fact that there are seven circuit courts of

[2] Respondent's premise for this argument is also based on his selective inclusion of statistics from the single year that supports his position. According to recent Federal Railroad Administration tables that respondent did not cite, accidents while adjusting couplers accounted for 27 injuries or fatalities in 1992, 30 in 1991, 35 in 1990, and 31 in 1989. Accident/Incident Bulletin Nos. 158-161, U.S. Dep't of Transp., Fed. R.R. Ass'n Office of Safety, Tables 66 & 67 (June 1990, July 1991, July 1992, July 1993). These numbers do not even include the FRA's nebulous category of other accidents that occurred while coupling or uncoupling cars, which accounted for 36 injuries or fatalities in 1993, 34 in 1992, 58 in 1991, 47 in 1990, and 34 in 1989. *Id.*; Accident/Incident Bulletin No. 162, U.S. Dep't of Transp., Fed. R.R. Ass'n Office of Safety, Tables 66 & 67 (June 1994). These numbers explain the large number of appellate cases on this issue. *See* note 3, *infra*.

[3] *See, e.g., Kavorkian* v. *CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994); *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Goedel* v. *Norfolk & W. Ry.*, 13 F.3d 807 (4th Cir. 1994); *Reed* v. *Philadelphia, Bethlehem*

appeals that have decided this precise issue makes this matter worthy of this Court's attention.

Moreover, injuries to railroad employees constitute only one side of this legal coin. While respondent argues that "casualties from adjusting couplers are not a major nationwide concern," Opp. 2, the Association of American Railroads' ("AAR") *Amicus* Brief amply demonstrates the substantial impact lawsuits from employee claims have on the railroad industry. AAR *Amicus* Br. 2.

More fundamentally, this split of judicial authority is an open invitation for railroad employees to forum shop. *Id.* at 6-8. When a case's outcome depends *exclusively* on a litigant's choice of courthouse, it is time for this Court to intervene.[4]

Ultimately, the problem facing the Court is not a "safety problem" for Congress to address, as respondent suggests. Opp. 8. It is a problem of statutory interpretation, and must be resolved because conflicting interpreta-

& New Eng. R.R., 939 F.2d 128 (3d Cir. 1991); *Maldonado* v. *Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *Coleman* v. *Burlington N., Inc.* 681 F.2d 542 (8th Cir. 1982); *Metcalfe* v. *Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892 (10th Cir. 1974); *Buskirk* v. *Burlington N., Inc.*, 431 N.E.2d 410 (Ill. App. Ct.), *cert. denied*, 459 U.S. 910 (1982); *Schaaf* v. *Chesapeake & Ohio Ry.*, 317 N.W.2d 679 (Mich. Ct. App. 1982), *cert. denied*, 464 U.S. 848 (1983); *Plouffe* v. *Burlington N., Inc.*, 730 P.2d 1148 (Mont. 1986).

[4] Respondent disingenuously suggests, Opp. 7, that review is unwarranted because railroad employee plaintiffs will merely add counts in their complaint under the FELA. But respondent did not do that here, and for good reason. Respondent chose to sue in Illinois state court, where strict liability under the SAA is the rule, *see Buskirk* v. *Burlington N., Inc.*, 431 N.E.2d 410 (Ill. App. Ct.), *cert. denied*, 459 U.S. 910 (1982), and adding a count under the FELA would only make a railroad employee vulnerable to a defense of contributory negligence. In fact, plaintiffs will *not* elect to add a count under the FELA where they have the advantage of strict liability under the SAA because they do not want to be exposed to the unnecessary risk of contributory negligence evidence.

tions are resulting in substantial unfairness to the railroad industry and unacceptable forum shopping by railroad employees. Therefore, certiorari should be granted to determine whether a railroad employee who goes between two cars to straighten a misaligned drawbar and is thereby injured is entitled to judgment as a matter of law under the SAA, even if there is no evidence that the drawbar was defective.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 8, 1995

(9)

No. 95-6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

---

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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August 2, 1995

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OCTOBER TERM, 1995

No. 95-6

NORFOLK & WESTERN RAILWAY COMPANY,
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Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

---

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This biref of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage and produce 94 percent of its freight revenues. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-

fault workers' compensation statutes in this country, Congress structured a tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated.[1]

Each year several thousand FELA lawsuits are filed against AAR members, and many more claims are settled before a suit is filed. AAR's members expend substantial sums of money defending FELA claims and suits and in the payment of FELA settlements and verdicts,[2] far more than is spent by industry as a whole in payment of compensation to employees.[3]

This case is of particular interest to AAR because it has the potential to enlarge the scope of liability for railroads. Moreover, it dramatically espouses the possibility of forum shopping under FELA.

AAR's interest in this case, which involves the interpretation of an equipment statute, is heightened as a result of AAR's long involvement in railroad operational issues. AAR's expertise in this area has been recognized by Congress which, in originally enacting the Safety Appliance Act, named AAR's predecessor organization, the American Railway Association, to designate to the Inter-

[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[2] For the past four years, AAR members have spent between $1.2 and 1.3 billion on FELA annually, or nearly 4 percent of their gross revenues. ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (Calendar years 1991, 1992, 1993, 1994) ("CLAIM & LITIGATION REPORT").

[3] Private industry as a whole pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABLIITY 59 (1995), whereas railroads pay over $2.00. 1994 CLAIM & LITIGATION REPORT, at 2-2.

state Commerce Commission the standard height of drawbars on freight cars. Act of March 2, 1893, c. 196, § 5, 27 Stat. 531.[4] AAR has recently participated in two cases involving the question of whether the Safety Appliance Act is violated when the failure of a coupler to couple automatically is due to misalignment of a drawbar rather than a defect in the coupler—the same issue as is presented in the case at bar. *See, Reed v. Philadelphia, Bethlehem & New England Ry.*, 939 F.2d 128 (3d Cir. 1991); *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994).

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

ARGUMENT

THE INCORRECT INTERPRETATION OF THE SAFETY APPLIANCE ACT BY THE COURT BELOW HAS A SUBSTANTIAL POTENTIAL IMPACT ON RAILROAD LIABILITY

This case involves the applicability of Section 2 of the Safety Appliance Act (SAA).[5] The purpose of this statute is to assure that coupling devices on rail cars will function on contact so as to avoid the necessity for employees to go between moving cars to couple them man-

[4] More recently Congress has authorized the Secretary of Transportation to use AAR's services in carrying out his duties with regard to power and train brakes. 49 U.S.C. § 20302(e).

[5] Now codified at 49 U.S.C. § 20302(a), in pertinent part this provision reads:

> [A] railroad carrier may use or allow to be used on any of its railroad lines—
>
> (1) a vehicle only if it is equipped with—
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without necessity of individuals going between the ends of vehicles;

ually. It was this dangerous activity that Congress sought to prevent when it enacted § 2 in 1893.[6]

Today, rail cars are all equipped with automatic couplers. However, even couplers that are in perfect working order will from time to time become misaligned due to the horizontal play of the drawbar required to permit the rounding of curves without derailment (Pet. brief at 3).[7]

The court below held that a railroad is liable as a matter of law under the SAA if an employee goes between rail cars and is injured while attempting to align a drawbar to allow for coupling of the cars even if there is no evidence of a defect in the couplers and the alleged failure to couple is due to misalignment of the drawbars. Given this ruling, the court prohibited the railroad defendant from introducing evidence of lack of defect in the coupler.

Petitioner's brief demonstrates a strong basis for review of the decision below by this Court: a split among the seven federal courts of appeals that have decided the issue, and a split between a state court and the federal court of appeals for the circuit in which the state court sits. Because of these developments, the risk that venue will dictate the outcome has risen to an unacceptable level in cases arising under a single federal law.

A. The Decision Below Expands The Scope Of Railroad Liability In FELA Cases Greatly

Under its unique provisions, FELA imposes liability on railroads for workplace injuries in cases where the railroads' negligence caused the injury. 45 U.S.C. § 51. However, unlike workers' compensation FELA does not

[6] 24 Cong. Rec. 1275 (1893).

[7] Federal Railroad Administration regulations recognize that couplers must contain sufficient lateral play to prevent "fouling on curves." 49 C.F.R. Part 215.125.

limit the amount of damages that may be collected when a railroad is liable.[8] Thus, a balance has been struck by FELA between limiting liability to cases where employer fault can be demonstrated while omitting any statutory limits on damages.[9]

The interpretation of safety statutes like the SAA plays an important role in FELA cases because a violation of such a statute constitutes negligence *per se*. *Urie v. Thompson*. 337 U.S. 163, 189 (1949); *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U.S. 384, 390 (1949). As a result, if there is a finding that a safety statute has been violated, the railroad may not introduce evidence that it used reasonable care in its operations. Moreover, the railroad may not introduce evidence that the employee's negligence contributed to the injury, which ordinarily would serve to reduce any judgment in proportion to the contributory negligence. 45 U.S.C. § 53. Therefore, a determination that the SAA was violated has a direct impact on a railroad's obligation to respond in damages to an injured employee and the amount of those damages.

By ignoring the majority of federal court decisions and finding the SAA applicable in cases where there was no defect in the coupling device, the court below has expanded the notion of strict liability under FELA and

[8] In order to create an incentive to return to work, workers' compensation programs commonly cap the amount of weekly benefits that can be received by an injured employee. U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS 22-25, Chart VI (1994).

[9] A FELA verdict will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National RR Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive). There were 79 FELA verdicts of $1 million or more against AAR members from 1990 through 1994. 1994 CLAIM & LITIGATION REPORT at 2-8.

shifted the balance in FELA prescribed by Congress.[10] In so doing, the court in essence made a public policy decision. While the wisdom of keeping one industry subject to a system under which an injured employee's right to compensation is conditioned on a showing of fault may be debated,[11] it is for Congress rather than the courts to decide to what extent railroads should be strictly liable for the injuries of their employees.[12]

B. Failure To Resolve This Issue Will Permit Substantial Federal Rights Of Railroad FELA Defendants To Be Determined By The Plaintiff's Choice Of Forum

The split between the circuits on this issue, and particularly between federal and state courts, creates a situation where the substantive rights of the parties may be determined by the choice of venue. This is contrary to Congressional intent under FELA, which is that the law with respect to employee compensation in the railroad industry be uniform. *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367 (1952).

Under FELA, state courts have concurrent jurisdiction to hear claims. 45 U.S.C. § 56. As between state and federal court, the plaintiff has an absolute choice of forum, as FELA cases may not be removed. 28 U.S.C. § 1445(a). Thus, even if the accident occurs in one of the eighteen

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[10] As this Court recently reaffirmed, "FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis for his liability is his negligence, not the fact that injuries occur." *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, at 2404 (1994).

[11] *See*, Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79 (Winter 1992).

[12] This Court has questioned the wisdom of FELA but has recognized that it is within Congress' province to make any change. *See e.g., Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 354 (1943); *Urie v. Thompson*, 337 U.S. at 196 (Frankfurter, J. concurring in part).

states[13] within the five federal circuits that have ruled there is no violation of the SAA when failure to couple is due to a misaligned drawbar, a plaintiff wishing to avoid that ruling may be able to do so by filing suit in state court. The potential for abuse is increased because FELA plaintiffs have wide latitude over the state in which to bring a suit.[14]

As this case makes clear, the state court hearing the claim may well decline to follow the precedent of the circuit in which it sits. As a result, in many parts of the country the same facts will lead to differing results. In state court, when misalignment of a nondefective drawbar is alleged, an employee would be relieved of the obligation to show any negligent conduct on the part of the railroad, while the railroad will be precluded from offering evidence of the employee's negligence. In the federal court, however, railroad negligence would need to be proved and the comparative negligence defense would remain available. This is untenable when the same federal statute is involved. It is contrary to the purpose of FELA to permit such disparate results to hinge on one party's selection of the forum.

The ruling below invites FELA plaintiffs to make an end run around the negligence requirement of FELA. Unless this Court decides this issue definitively, state courts will have the ability to impose strict liability on railroads in factual situations similar to the case at bar despite the weight of federal precedent to the contrary, thereby encouraging forum shopping. The court below acknowledged as much, suggesting that, absent resolution of this issue by this Court, the court below will continue to follow

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[13] Approximately 49 per cent of rail employees reside in those eighteen states. ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS 57 (1994 ed.) ("RAILROAD FACTS").

[14] A plaintiff may bring a FELA suit "wherever the railroad shall be doing business." 45 U.S.C. § 56.

state precedent. There are hundreds of thousands of rail cars in operation on the rail network daily.[15] In as much as nondefective drawbars will not infrequently become misaligned in the course of normal operations, there will be numerous potential opportunities for unwarranted expansion of railroad liability through forum shopping.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Appellate Court of Illinois in this case be granted.

Respectfully submitted,

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August 2, 1995

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[15] In 1993, there were 1,173,132 freight rail cars in service. RAILROAD FACTS at 50.

No. 95-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,
v.
WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial District

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PETITION FOR CERTIORARI FILED JUNE 30, 1995
CERTIORARI GRANTED SEPTEMBER 27, 1995

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MADISON COUNTY, ILLINOIS

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ILLINOIS SUPREME COURT

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[Filed Dec. 26, 1991]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 91-L-1605

WILLIAM J. HILES,
Plaintiff,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
a corporation,
Defendant.

COMPLAINT

Comes now the Plaintiff, WILLIAM J. HILES, by his attorneys, CALLIS LAW FIRM, and for his cause of action against the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, states:

1. That on or about the 18th day of July, 1990, and at all times herein mentioned, the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, was a corporation, organized and existing as a common carrier by rail in and throughout several states of the United States and for the purpose thereof did own, possess, operate and maintain divers railroad cars, tracks and other equipment in and about Madison County, Illinois.

2. That at all times herein mentioned, Plaintiff, WILLIAM J. HILES, was employed by the Defendant as a yardman, in the furtherance of interstate commerce and brings this action pursuant to the authority of Title 45, Section 1, et seq. of the United States Code, commonly referred to as the Safety Appliance Act.

3. That on July 18, 1990, the plaintiff, WILLIAM J. HILES, was working as a member of a switching crew located at Defendant's St. Louis Yard, at or near St. Louis, Missouri. At that time, in the course and scope of his duties, he was required to go between two railroad cars to straighten a misaligned draw bar and was injured attempting to "straighten" said drawbar, all in violation in whole or in part of the aforesaid Safety Appliance Act.

4. That as a result in whole or in part of the foregoing violation of said Safety Appliance Act, Plaintiff, WILLIAM J. HILES, was severely and permanently injured in that his back, and the bones, muscles, tissues, discs and nerves thereof were severely bruised, contused, lacerated, ruptured and made sore; and that he has suffered and will continue to suffer great bodily pain; and he has lost and will continue to lose large sums of money which he otherwise would have earned; that his earning capacity has been permanently impaired; and that he has spent large sums of money endeavoring to be cured of his injuries all to his damage in an amount in excess of FIFTEEN THOUSAND DOLLARS ($15,000.00).

WHEREFORE, Plaintiff, WILLIAM J. HILES, prays judgment against the Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, in an amount in excess of FIFTEEN THOUSAND DOLLARS ($15,000.00) and costs of suit.

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[Filed Jun. 18, 1992]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

(Title Omitted in Printing)

ANSWER AND JURY DEMAND

Defendant, Norfolk and Western Railway Company, by its attorneys, Thompson & Mitchell, for its answer to plaintiff's complaint, states as follows:

1. Defendant admits the allegations of paragraph 1.

2. Defendant admits that William Hiles was an employee of defendant. Defendant also admits the existence of the Safety Appliance Act. Defendant denies the remaining allegations of paragraph 2 and further denies that the Safety Appliance Act applies to plaintiff's claim.

3. Defendant denies the allegations of paragraph 3.

4. Defendant denies the allegations of paragraph 4 and further denies that plaintiff was injured in the nature or to the extent claimed.

By way of affirmative defenses, defendant states that plaintiff committed acts or omissions of contributory negligence all in mitigation of any damages claimed. Defendant further states that plaintiff's acts or omissions of contributory negligence were in excess of 50% in bar of plaintiff's claim.

Defendant further states that plaintiff has failed to mitigate his damages.

Defendant further states that all or part of plaintiff's condition is a result of a preexisting condition for which this defendant is not responsible.

DEFENDANT DEMANDS
TRIAL BY JURY.

THOMPSON & MITCHELL

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(Certificate of Service Omitted in Printing)

[Filed May 20, 1993]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

(Title Omitted in Printing)

AMENDED ANSWER

Defendant, Norfolk and Western Railway Company, by its attorneys, Thompson & Mitchell, for its amended answer to plaintiff's complaint, states as follows:

1. Defendant admits the allegations of paragraph 1.

2. Defendant admits that William Hiles was an employee of defendant. Defendant also admits the existence of the Safety Appliance Act. Defendant denies the remaining allegations of paragraph 2 and further denies that the Safety Appliance Act applies to plaintiff's claim.

3. Defendant denies the allegations of paragraph 3.

4. Defendant denies the allegations of paragraph 4 and further denies that plaintiff was injured in the nature or to the extent claimed.

By way of affirmative defenses, defendant states that plaintiff committed acts or omissions of contributory negligence all in mitigation of any damages claimed. Defendant further states that plaintiff's acts or omissions of contributory negligence were in excess of 50% in bar of plaintiff's claim.

Defendant further states that plaintiff has failed to mitigate his damages.

Defendant further states that all or part of plaintiff's condition is a result of a preexisting condition for which this defendant is not responsible.

Defendant further states that plaintiff's claim that the drawbar or coupler was not aligned was a result of simple misalignment and not the result of defective equipment.

Defendant further states that the car in question was not in use and on its line.

DEFENDANT DEMANDS
TRIAL BY JURY.

THOMPSON & MITCHELL

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(Certificate of Service Omitted in Printing)

[Filed May 20, 1993]

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

(Title Omitted in Printing)

AFFIDAVIT OF WALTER A. MILLER, JR. IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Walter A. Miller, Jr., after first being duly sworn, on his oath says and deposes:

1. I have been employed by Norfolk Southern Corporation for the past 20 years. I am currently a General Foreman and have been employed in that capacity for the past 10 years. As General Foreman, I supervise the repair of railcars, the operation of railcars and perform examinations of railroad cars.

2. While acting in the capacity of General Foreman, I conducted an inspection on Railcar No. TTBX-966015 on July 18, 1990 at 5:40 a.m. in St. Louis, Missouri at Luther Yard Track No. 15. This railcar is a FA-Auto Rack which is an enclosed bi-level car equipped with racks for automobile transportation. The coupler at the "A" end of the railcar is known as a "longshank." The coupler was manufactured by CSF, type E69AE. The coupler on the "A" end was 32½" high with lateral play of 21". This car was properly equipped for interchange service and in good condition with no defects noted. A copy of my inspection report is attached and incorporated in this affidavit.

3. Norfolk Southern Corporation has been a member of the Association of American Railroads (hereinafter

AAR) for the entire duration of my employment, including July 18, 1990.

4. The AAR publishes a Field Manual of the AAR Interchange Rules.

5. In my capacity as a General Foreman for Norfolk Southern Corporation, I keep a copy of the AAR Interchange Rules in order to supervise compliance. The Interchange Rules apply to all railcars intended for interchange service. The AAR Interchange Rules, set out coupler types and conditions which are permissible to use on interchange lines to insure compatibility with other interchange cars and safety. A copy of the applicable AAR Interchange Rules are attached and incorporated into this affidavit.

6. On July 18, 1990 at approximately 4:00 a. m., William J. Hiles claims an injury while aligning a coupler on the A-end Coupler of Railcar No. TTBX-966015.

7. Car No. TTBX-966015 coupler on the "A" end, based upon the measurements and inspection made on July 18, 1990, meets the AAR guidelines published in the Interchange Rules.

8. The subject coupler on the A end of Railcar TTBX-966015, on July 18, 1990, was not defective and within the standards and rules outlined by the AAR.

9. If called to testify in this matter with regard to the quality of the subject drawbar and coupler in the above litigation, I would rely upon information obtained in my examination and my personal experience and knowledge gained throughout my career. My testimony, if called at trial, would be consistent with all facts herein.

FURTHER AFFIANT SAYETH NOT.

/s/ Walter A. Miller, Jr.
WALTER A. MILLER, JR.

(Notary Omitted in Printing)

IN THE CIRCUIT COURT,
THIRD JUDICIAL CIRCUIT,
MADISON COUNTY, ILLINOIS

EXCERPT FROM OPENING ARGUMENT BY THE DEFENSE

(May 19, 1993)

* * * *

[20] [BY MR. ALVEY:]

* * * And on this case, on this day Mr. Hiles was working with an engineer and another switchman, Larry Fauver—who will be here during the course of Lance's opening statement—and what they were doing that night was working in the Luther Yard, it was about 4 a.m., and what they were doing was making up trains in the Luther Yard, putting the cars together. And they came upon this one car where the drawbar on the car was screwed or turned over in one direction, and it became obvious to the two men that with the drawbar in that position when the cars came together the drawbars would miss and so the cars would not be connected or coupled up. So the two men, Bill Hiles and Larry Fauver went between the rails of the cars, there was a distance, there was a gap there, and they went between the cars, and Mr. Fauver got on one side of the drawbar and Mr. Hiles got on the other side of the drawbar, there were two men in there, and one pushed with his back and the other one pulled and lined up this drawbar, and it was during this period of time that Mr. Hiles felt pain in his back, and thereafter was—as Lance indicated—he was taken to Barnes Hosital. He went back to the yard office and was taken to Barnes Hospital. But basically those are the facts of how the accident occurred.

* * * *

EXCERPTS FROM TESTIMONY OF LARRY FAUVER

(May 19, 1993)

* * * *

[37] BY MR. JENSEN:

Q. State your name for the record please.
A. Larry Fauver.

* * * *

[38] A. I'm a switchman on Norfolk Southern Railroad.

* * * *

[43] Q. Approximately—let's have you step up here and tell us that at about 4:00 in the morning where were you working?

A. On this lead right here, where you see these railroad cars, and I was standing here pulling the pins on the cars, and we were switching these cars in these various tracks right here.

Q. And if I can have you stay here one moment please. Now, you've explained that you're changing the pins on the cars and changing cars. Were you working on a particular car at that time, about 4:00?

A. A particular—

Q. Did you have a problem in the—did you have a problem with a particular rail car?

A. Yes.

* * * *

[44] Q. * * * Mr. Fauver, this picture was produced by the Norfolk and Western and Southern Railroad as the car. Do you recognize this picture?

A. I imagine that's the car.

Q. What type of car is that?

A. That's an auto wreck car that carries automobiles in it.

Q. Approximately how long is that car?

A. 889 feet long.

Q. How much does it weigh?
A. About 30 or 35 tons.
Q. How are cars coupled together?
A. Well, you can either shove—you can shove a car down and couple the coupling together or kick the car into the track and coupling.
Q. When you say "shove a car", the engine would come and physically ram another car and they will automatically couple?
A. Yes.
Q. Did the cars automatically couple on July 18th?
A. This car couldn't couple unless you slued the drawbar over and straightened it out. The drawbars have to be straight to couple.

* * * *

[45] Q. How far does—how long is the drawbar from the point of the coupler all the way underneath the car?
A. I guess it goes back in here four feet maybe. It goes way back in here, and it will slue all the way from this point to that point.
Q. So the drawbar would move forward and backward?
A. Yeah. Well, left and right.
Q. And left and right?

* * * *

Q. So the drawbar would move to the left and right. And what's the purpose of the movement?
A. When the train is actually going down the track going around a curve and that the drawbar will slue.
Q. Would you explain to the jury what the front portion of the drawbar is?
A. This is where they coupled together. This is the knuckle that opens up.
[46] Q. When the cars couple together, do the knuckles then engage?
A. This one is open and then two couples come together and they close on each other like this, and it drops this pin so it can't be opened up.

Q. How much does a coupler or knuckle weigh?
A. Just this knuckle right here that comes out with this pin is quite a thing to carry. To carry one even the length of a car is really heavy. I believe this drawbar weighs about 700 pounds.
Q. And the knuckle?
A. I'm not an expert, but you can't pick it up.

* * * *

Q. You've indicated the drawbar was slued to one side. Do you recall which side it was slued to?
A. It was slued to this side here.

* * * *

[47] Q. And was it your job and Mr. Hiles' job to couple that car to the train?
A. Yes.
Q. Now, when you noticed the drawbar was slued, what did you and Mr. Hiles do?
A. We walked over there to slue it to the center position so that it could couple, because I was going to kick another car in there on top of that one. It has to be in the middle. If it's over to the side they'll hit.
Q. How were you going to move it into the middle position?
A. I was going to move it with my body. I like to put my back to it and shove it back myself rather than push it over. It's kind of difficult pushing it to the center.
Q. Have you been taught how to do that by the railroad?
A. No. I mean, I've had switchmen show me how to do it. You can either shove it over or with your back to it or twist it to the center.
Q. Were you going to do this by yourself?
A. Sometimes I do.
Q. On this occasion?
A. On this occasion Bill and I were going to both [48] shove it over.

Q. So you turned with your back towards the drawbar and you began pushing. What position did Mr. Hiles take?

A. He was on the other side pulling on it.

Q. What happened as you were pushing and he was pulling?

A. Well, I shoved it over, and I turned around and Mr. Hiles was on his knees and complaining that he was hurt.

Q. Did it shove easily?

A. No.

Q. Were you in between the cars at that time?

A. Well, the other car was down the track four or five car lengths away. I mean, he wasn't close, but I was in between those two cars.

Q. Was Mr. Hiles likewise in between the rails?

A. Yes.

* * * *

[52] [BY MR. ALVEY:]

Q. When the cars go around a curve in a train, did I understand you to say this drawbar would move from side to side, depending on the direction of the curve?

A. Right.

Q. That's correct, isn't it?

A. Yes.

* * * *

Q. * * * When the car is uncoupled when the car is on a curve, does the drawbar automatically come back?

A. Not on most cars.

* * * *

EXCERPTS FROM TESTIMONY OF WILLIAM HILES

(May 19, 1993)

* * * *

[144] BY MR. JENSEN:

Q. State your name please.

A. William Hiles.

* * * *

[160] Q. And would you tell us what happened at that time from the time that you first came up to that car and noticed it would not couple?

A. Well, the drawbar that was connected together was crooked, and Mr. Fauver was on one side and I was on the other and we attempted to straighten it.

Q. How do you straighten the drawbar?

A. He was pushing and I was pulling.

Q. Had you been taught by the Norfolk and Western proper procedures and had gone to seminars on drawbars and straightening drawbars?

A. We had instructions.

Q. Were you following all the proper procedures?

A. I believe I was.

Q. Where were you standing at this time?

A. I was standing just next to the drawbar with my feet somewhat spread apart.

Q. In between the rails?

A. In between the track, the rails, that's right.

Q. Was Mr. Fauver also in between the rails?

A. He was.

Q. Were the two of you in between the car couplings?

[161] A. That's correct.

Q. What happened then as you attempted to straighten that drawbar?

A. Well, I was pulling on it as hard as I could. There was a lot of times we did that. I got a sharp pain in my back, my lower back, and I couldn't stand. I went down and went to my knees.

* * * *

[189] [BY MR. ALVEY:]

Q. Then in July of 1990 at about 4:30 in the morning you were out in the Luther Yard and you were performing the basic general duties of a switchman, is that right?

A. That's correct.

Q. And part of the duty of a switchman are to line up drawbars, is that right?

A. That's correct.

* * * *

Q. So you'd been doing that type of job for basically 26 years?

A. That's right, that's correct.

Q. And had you done that type of job solely by yourself before without any assistance lining up a drawbar?

A. Oh, yes.

[190] Q. Okay. On this occasion when you and Mr. Fauver were out there there were two of you lining up the drawbar. is that right?

A. Yes, we were.

Q. And you were both between the rails?

A. Yes.

Q. And you were pushing or pulling?

A. Pulling.

Q. And you felt this pain in your back?

A. Yes.

* * * *

DEFENDANT FILING AMENDED ANSWER AND DENIAL OF DEFENDANT'S MOTION FOR DIRECTED VERDICT

(May 20, 1993)

* * * *

[248] MR. ALVEY: Your Honor, the defendant has prepared and is now filing a copy of the motion for leave to amend the answer and an amended answer, and I will tell the Court basically what that pleading does. We have an issue in this case with regard to the Safety Appliance Act, and it is basically the defendant's position that the plaintiff must prove more with regard to the accident than the fact that he went between the rails and he was injured attempting to climb up the drawbar. It's basically our position that—

THE COURT: I think I'm familiar with the position and I think I've already ruled on it, and the rulings will stay consistent and you don't need to repeat it.

MR. ALVEY: Okay. The purpose of this answer, if there is any question with regard to whether or not the proving of a defect is an affirmative defense under the interpretation [249] of the Safety Appliance Act, all this pleading does is simply to assert the defect as an affirmative defense. It does nothing more than that. And as I've indicated before we will make an offer of proof with regard to the defect.

* * * *

MR. ALVEY: Your Honor, the plaintiff has rested, and when we began the trial we filed a Motion for Summary Judgment and affidavits in support thereof on the single count, the Safety Appliance Act count. At this point in time the defendant has filed a Motion for Directed Verdict at the conclusion of the plaintiff's case and in support of our Motion for Directed Verdict we would assert the matters set forth in our Motion for Summary Judgment and the affidavit [250] attached thereto, and it is my understanding that the Court has given us

leave to make an offer of proof with Mr. W. A. Miller later on today, that will relate to the mechanic condition of the coupler device, but at this point we are presenting our motion for directed verdict at the conclusion of the plaintiff's case.

THE COURT: The motion is denied.

* * * *

DEFENDANT'S OFFER OF PROOF, TESTIMONY OF WALTER MILLER

(May 20, 1993)

* * * *

[298] MR. ALVEY: Let the record show that this is a hearing held out out of the presence of the jury. The parties are present, the Court is present.

[299] Q. Sir, would you state your full name for the record please?

A. Walter A. Miller, Jr.

Q. And would you tell the Court your occupation?

A. I'm a general foreman with Norfolk and Southern Corporation here in St. Louis.

Q. And how long have you had that capacity?

A. I have been a general foreman wtih Norfolk and Southern for ten years.

Q. I hand you what has been marked as Defendant's Exhibit Number 6 which purports to be an affidavit executed by yourself and several exhibits to that affidavit. Are you familiar with that, sir?

A. Yes, sir.

Q. Are the matters stated therein true and correct to the best of your information and belief?

A. Yes, sir, it is.

Q. Did you in fact inspect the drawbar and coupler on the car involved in the injury of William J. Hiles?

A. Yes, sir, I did.

Q. And as part of the affidavit is there a copy of your inspection report?

A. Yes, sir, there is.

Q. Are you generally familiar with the rules and [300] regulations in the railroad industry that governs the design and operation of drawbars and coupling devises?

A. Yes, sir, I am.

Q. As a result of your inspection did you find any type of mechanical defect in the drawbar of the coupling device on the particular car involved?

A. No, sir, I didn't.

* * * *

GRANT OF PLAINTIFF'S MOTION FOR DIRECTED VERDICT

(May 20, 1993)

* * * *

[300] THE COURT: This is a motion for a directed verdict [301] which has been filed. What say the defendant?

MR. REITZ: We oppose the motion for directed verdict. The motion for directed verdict cites the *Buskirk* opinion and generally states that—alleges that the workman need only prove that he went between the cars after they failed to automatically couple and he was injured while aliging a misaligned drawbar.

It's our position, first of all, that *Buskirk* is not the law under the FELA, that the United States Supreme Court in *Affolder* cited in our Motion for Summary Judgment Fourth Circuit Court, in *Reed* and the *Maldonado* case states the proper position, and that is the mere failure—

THE COURT: I understand your position, but I guess where I am right now is based on my previous ruling and assuming that I adhere to that, which I now do, then there is no reason why the motion for summary —Motion for Directed Verdict should not be granted, because there is no dispute as to the facts that I understand, none whatsoever. I mean, based on my previous ruling it seems to me that the motion for directed verdict has to be granted.

MR. REITZ: We oppose it for all the reasons previously stated and the testimony of Mr. Miller saying there is no defect.

THE COURT: So the motion for directed verdict is [302] granted.

MR. ALVEY: For the record, Judge, in our Counter Motion for Summary Judgment—

THE COURT: Is denied.

MR. ALVEY: Denied.

* * * *

DENIAL OF DEFENDANT'S MOTION FOR DIRECTED VERDICT AND MOTION FOR SUMMARY JUDGMENT

(May 21, 1993)

* * * *

[316] MR. ALVEY: At the conclusion of all of the evidence the defendant renews the motion for directed verdict, motion for summary judgment as previously filed on the Safety Appliance Act issues.

THE COURT: Those motions are again denied.

* * * *

DEFENDANT'S OFFER OF PROOF
EXCERPTS FROM TESTIMONY OF LARRY FAUVER

(May 21, 1993)

* * * *

[325] MR. ALVEY: Mr. Favre, would you please identify yourself for the record please?

A. Larry Fauver.

* * * *

[326] Q. * * * Sir, you were working with Mr. Hiles at the time of his accident, is that correct?

A. That's right, I was.

Q. Were you the employee of the N & W which uncoupled the car upon which Mr. Hiles was injured—

A. Yes.

Q. —shortly before his injury?

A. Yes, I uncoupled that.

Q. At the time you uncoupled the car and released the knuckle, was the drawbar slued at that time?

A. Yes, sir, it was.

* * * *

MR. REITZ: * * * [327] it is our position, shows that the drawbar in question, there is no evidence of a defect both by plaintiff's own testimony, the affidavit, the evidence we presented that the drawbar in question was pulled on a curve or slope, that's the evidence we will propose to provide here through our offer of proof and further evidence if we were allowed to provide it, and that's in line with the *Affolder, Reed* and *Maldonado* opinions.

THE COURT: The offer of proof will be so noted.

* * * *

DIRECTION OF VERDICT ON LIABILITY TO THE JURY

(May 21, 1993)

* * * *

[329] THE COURT: * * *

Prior to the time of the final argument I have one announcement to make to the jury. The Court after hearing the evidence in this case has directed a verdict in favor of the plaintiff William Hiles and against the defendant Norfolk and Western Railway Company on the issue of liability, therefore, you will have no need to consider that issue in your deliberations.

* * * *

(5)

No. 95-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial District

---

BRIEF FOR PETITIONER

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November 9, 1995

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QUESTION PRESENTED

Whether a railroad employee who goes between two railroad cars to straighten a misaligned drawbar and is thereby injured is entitled to judgment as a matter of law under the Safety Appliance Act, 49 U.S.C. § 20302(a)(1)(A), even if there is no evidence that the drawbar was defective.

LIST OF PARTIES AND RULE 29.6 LIST

The only parties to this proceeding are the petitioner Norfolk & Western Railway Company and the respondent William J. Hiles.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Norfolk & Western Railway Company states that it is a subsidiary of the Norfolk Southern Corporation.

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IN THE

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On Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial District

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The judgment of the Circuit Court, Third Judicial Circuit, Madison County, Illinois, Pet. App. at 9a-10a, is not reported. The opinion of the Appellate Court of Illinois, Fifth District, *id.* at 1a-7a, is reported at 644 N.E.2d 508. The order of the Illinois Supreme Court denying petitioner's petition for leave to appeal, *id.* at 8a, is not reported.

JURISDICTION

The judgment of the Illinois Appellate Court, Fifth Judicial District, was entered on December 29, 1994. Pet. App. at 1a-7a. The Illinois Supreme Court entered its Order Denying Petition for Leave to Appeal on April 5,

1995. *Id.* at 8a. The petition for a writ of certiorari was filed on June 30, 1995, and was granted on September 27, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

During the period relevant to this case, Section 2 of the Safety Appliance Act ("SAA") provided in pertinent part:

> [I]t shall be unlawful for any . . . common carrier [engaged in interstate commerce by railroad] to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U.S.C. § 2. Congress revised the provision effective July 5, 1994 and transferred it to 49 U.S.C. § 20302(a), which states in relevant part:

> [A] railroad carrier may use or allow to be used on any of its railroad lines—
>
> (1) a vehicle only if it is equipped with—
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . . .

In amending the statute, Congress expressly provided that it did not intend to effect any "substantive change in the law" nor did it mean to "impair the precedent value of earlier judicial decisions and other interpretations." H.R. Rep. No. 180, 103d Cong., 2d Sess. 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 822. For convenience, petitioner will refer to the current version of the statute, 49 U.S.C. § 20302(a).

STATEMENT OF THE CASE

1. Respondent William J. Hiles, an employee of petitioner Norfolk & Western Railway Company, was a member of a switching crew at petitioner's Luther Yard in St. Louis, Missouri. Appeals Record ("R.") at C250, C256. His duties on July 18, 1990, included coupling and uncoupling railroad cars and aligning drawbars. Report of Proceedings, Jury Trial ("Tr.") at 159, 188-89.

Railroad cars are connected, or coupled, by mechanisms located at both ends of each car. A coupling mechanism consists of a knuckle, which is a clamp that opens and closes, joined to the end of a drawbar. *Id.* at 45-46. This drawbar is fastened to a housing mechanism on the car. When two cars come together, the open knuckle of one car engages the knuckle on another car, and the cars couple automatically. *Id.* at 44.

In order for coupling to take place, the drawbars of the cars must be aligned to connect on impact. R. at C257; Tr. at 44. If they are not aligned before coupling, the knuckles will pass and not contact each other, and the cars will not couple. All drawbars are designed to have some lateral play. If the cars were joined by rigid drawbars, moving cars would derail on a curved track. Because of this necessary lateral movement, drawbars may become misaligned, or "slued," and remain in that position when uncoupled on a curved track. *Id.* at 45, 52. When such misalignment occurs, drawbars must be realigned manually. Manual alignment of a drawbar requires an employee to go between the cars to straighten the bar; there is not now and never has been an automatic alignment device in common use in the railroad industry. See *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823, 831 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 130 (3d Cir. 1991).

2. The equipment involved in coupling railcars has been regulated by the federal government under the Safety

Appliance Act since 1893. Before passage of the SAA in 1893, there was no federal requirement that couplers on railroad cars be uniform, and railroads across the country had their railcars equipped with a variety of different mechanisms. There existed at that time approximately 7,000 patents on automatic couplers, and 37 different types were in use. S. Rep. No. 1049, 52d Cong., 1st Sess. 5-6 (1892).

Many cars used a "link and pin" system that required employees to go between the cars to guide an iron link into a slot on the approaching car and to drop a loose pin through the link to hold it in place. See *United Transp. Union* v. *Lewis*, 711 F.2d 233, 246 (D.C. Cir. 1983) (photograph of trainman between two cars manually coupling a link and pin coupler). "Certainly it has been proven by experience, and long experience, that the common cars . . . coupled with links can not be coupled and uncoupled in practice in any other way, except by going between the cars." 24 Cong. Rec. 1417 (1893) (statement of Sen. McPherson). Other cars were furnished with various *automatic* couplers. One switchman testified to the Senate Committee on Interstate Commerce:

> You want to understand that the switchman's life in the day time has an even chance, but the man who works after dark has not the ghost of a show under the present system of things. All he has is a little bit of a hand lantern which throws a light 10 or 20 feet. He goes in to make a coupling, and he does not know the conditions that exist there. He does not know whether it is a Janney or a Hinson, a Dawling, a Drexel or some other kind of a draw-bar.

S. Rep. No. 1049, 52d Cong., 1st Sess. 5 (1892).

The couplers of railroad cars reaching interchange points with other railroad lines therefore did not automatically couple before the SAA's mandate, and railroad employees had to go between railroad cars while the cars were moving together in order to couple the cars manually. See 24 Cong. Rec. 1280 (1893) (statement of Sen. Chandler). In addition, when the SAA was enacted, there were coupling devices in use which, while coupling automatically by impact, required brakemen to go between the cars to *un*couple them by hand. *United Transp. Union*, 711 F.2d at 244.

Going between two cars to couple or uncouple them while they are moving is particularly dangerous. As one Senator described the situation during the floor debates:

> A railroad employe[e] . . . is asked to step inside the track, stand up against a car which is not moving, and watch the coming of another car, which is being pushed steadily up against the car near which he stands . . . . I doubt whether there is a Senator here who can stand deliberately and see a long train coupled in the way the coupling is now done without turning his eyes away as two cars come together just before it is the duty of the car-coupler to make the connection and then get out of the way.

24 Cong. Rec. 1280 (1893) (statement of Sen. Chandler). In 1890 President Benjamin Harrison urged Congress to pass legislation "looking to uniformity and increased safety in the use of couplers and brakes upon freight trains engaged in interstate commerce." S. Rep. No. 1049, 52d Cong., 1st Sess. 3-4 (1892). What is now § 20302 (a)(1)(A) was enacted to ensure that coupling equipment was compatible and interchangeable nationwide. See S. Rep. No. 1049 at 6; H.R. Rep. No. 1678, 52d Cong., 1st Sess. 3 (1892).

3. On July 18, 1990, respondent was working as a switchman at petitioner's railyard along with Larry Fauver, a conductor. R. at C250, C255-56. At approximately 4:00 a.m., respondent was walking along the tracks, examining drawbars to determine if they were properly aligned, when he noticed a car with a misaligned drawbar. *Id.* at C258-59. The car, No. TTBX-966015, was a bi-level SA-Auto Rack rail car used to

transport automobiles and was at that time coupled to another car. R. at C459; J.A. at 13, 24; Tr. at 44. There was a curve at the north end of the area where the car was located. R. at C260.

Fauver testified at trial that when he uncoupled the cars, the drawbars were misaligned. J.A. at 24. This uncoupling must have taken place on a curve where the drawbars would have remained misaligned when the car stopped. Then a locomotive pulled the car forward, and the slued position of the drawbar did not change. Fauver testified that both he and respondent then went "between" the two cars, which were four or five car lengths apart and not moving, to straighten the misaligned drawbar. Tr. at 48. Respondent was pulling the drawbar towards him while Fauver was pushing it in an attempt to straighten the bar. J.A. at 17-18. In circumstances that could not be more different than those that animated Congress's passage of § 20302(a)(1)(A), respondent injured his back during this process. *Id.*

4. Respondent filed suit on December 26, 1991, in the Circuit Court of Madison County, Illinois, alleging only that petitioner violated 49 U.S.C. § 20302(a)(1)(A). *Id.* at 4-5. The SAA makes it unlawful for a railroad to use any car not "equipped with . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles." 49 U.S.C. § 20302(a)(1)(A).[1] Respondent included in his complaint no allegations of negligence that would have raised a claim directly under the FELA. J.A. at 4-5. Petitioner filed an Answer, *id.* at 6-7, and then an Amended Answer, raising the affirmative defense that any misalignment of the drawbar did not result from defective equipment. *Id.* at 8-9.

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[1] The Federal Employer's Liability Act ("FELA") renders railroads liable for a violation of the SAA. 45 U.S.C. § 51.

During trial, petitioner filed a Motion for Summary Judgment on the issue of liability, arguing that it had produced evidence that there was no defect in the drawbar alleged to have caused respondent's injury, and that respondent had produced nothing to controvert that evidence. R. at C559-61. The court denied this motion. J.A. at 22, 23. The court also denied petitioner's Motion for Directed Verdict at the close of respondent's case and at the close of all evidence. *Id.* at 20, 23. Instead, the court granted respondent's Motion for a Directed Verdict on the issue of petitioner's liability premised solely upon a violation of the SAA. *Id.* at 22.

Petitioner made two offers of proof that the misalignment of the drawbar was not caused by a defect in the equipment: the uncontradicted affidavit and testimony of Walter Miller, general foreman, *id.* at 10-11, 21, and the testimony of Larry Fauver, conductor, *id.* at 13-16. Miller testified that he inspected the drawbar at 5:40 a.m., less than two hours after the accident, and found that neither the coupler nor the drawbar was defective. Fauver testified that, at the time he uncoupled the rail cars, the drawbar on the car on which respondent was injured was misaligned. In addition, respondent testified at his deposition that he was unaware of any defect in the drawbar. R. at C291-92.

After the court decided liability adversely to petitioner, it directed a verdict and instructed the jury to deliberate solely on damages. J.A. at 25. The jury awarded respondent $492,500.00, and judgment was entered against the railroad on May 24, 1993. Pet. App. at 9a-10a.

5. The Fifth Judicial District of the Appellate Court of Illinois affirmed the Circuit Court on December 29, 1994. *Id.* at 1a. The appellate court explicitly recognized its duty to apply federal case law when interpreting the SAA. *Id.* at 4a. Nevertheless, the court followed only those federal court cases comporting with Illinois case law interpreting the SAA, see *Buskirk* v. *Burlington N., Inc.*,

431 N.E.2d 410 (Ill. App.), *cert. denied*, 459 U.S. 910 (1982); *Coleman* v. *Burlington N., Inc.*, 681 F.2d 542 (8th Cir. 1982); *Metcalfe* v. *Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892 (10th Cir. 1974), and affirmed the trial court's judgment. Pet. App. at 7a. The court held that "a railroad is liable as a matter of law" when an employee can show that two railroad cars failed to couple automatically, and that an employee went between those cars and was injured while attempting to realign a drawbar. *Id.* at 6a. The employee, held the court, is entitled to a directed verdict on liability regardless of whether the coupling equipment was defective. *Id.* at 7a. The Illinois Supreme Court denied review. *Id.* at 8a.

SUMMARY OF THE ARGUMENT

A.

Respondent has sued solely under the SAA, a federal law that requires railroad cars to be "equipped with . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles." 49 U.S.C. § 20302(a)(1)(A). Respondent alleges that this language renders railroads *per se* liable whenever railroad employees go between railroad cars and are injured when working with the coupling mechanism. This interpretation, however, contradicts the SAA's plain language, which does not prohibit employees from going between cars to realign equipment that is not defective. The language focuses on safety equipment, not operating procedures.

B.

Congress's purpose in enacting § 20302(a)(1)(A) was to prescribe the use of certain safety equipment, and not to mandate or ban operating procedures such as going between two cars, even when the process happens to relate to coupling railroad cars. The SAA's legislative history shows that the 52d Congress was concerned about

the danger of switchmen coupling and uncoupling two cars while the cars were in motion, and did not mean to bar the act of going between cars, whether stationary or moving. In fact, Congress expressly directed the Secretary of Transportation to prescribe safety regulations for employees going "on, under, or between [rolling] equipment." 49 U.S.C. § 20131.

C.

Regulations promulgated by the Federal Railroad Administration ("FRA") show that operations requiring an employee to stand between two cars are clearly not prohibited. See 49 C.F.R. §§ 218.22(c), 218.39(a). These regulations contemplate situations in which railroad employees must go between two cars to perform their jobs, including adjusting couplers. The FRA requires certain procedures to be followed to increase safety in those situations, but obviously these regulations are inconsistent with imposing liability under the SAA for any injury to an employee who happens to be between two cars.

D.

This Court has previously held that a railroad cannot be found *per se* liable under the SAA if the coupling mechanism was not set properly and had no chance to couple. *Affolder* v. *New York, Chicago & St. L.R.R.*, 339 U.S. 96, 99 (1950). While *Affolder* involved a situation where closed knuckles prevented cars from coupling, its reasoning logically extends to misaligned drawbars. It establishes that, if the equipment was not properly set so that coupling would take place automatically upon impact, the railroad has a defense to liability. Thus, in this case, the necessity for pre-coupling manual alignment does not violate the Act. Moreover, whether or not the equipment was properly set or was defective is a question of fact, *Atlantic City R.R.* v. *Parker*, 242 U.S. 56, 59 (1916); *San Antonio & Aransas Pass Ry.* v. *Wagner*, 241 U.S. 476, 483-84 (1916), and petitioner

was improperly denied the opportunity to present that question to the jury.

E.

Where a railroad has statutorily required nondefective coupling equipment in place, it should not be held strictly liable for injuries that occur while employees prepare to couple cars. Drawbars become slued in the normal course of railroad car operations without defect, and there is no equipment commonly in use in the railroad industry that would align the drawbars automatically. Accordingly, employees must occasionally realign drawbars manually while standing between the railroad cars. In this case, petitioner had the proper equipment in place at the time of respondent's accident while he was manually realigning the drawbars. The railroad therefore was in compliance with the SAA because it had the statutorily required safety equipment installed. It is not for this Court to mandate the development of new equipment; instead, it should interpret the SAA as written. See *United States* v. *Seaboard Air Line R.R.*, 361 U.S. 78, 82 (1959).

F.

Permitting railroads to present evidence of nondefective equipment as a defense to an SAA charge will not deprive plaintiffs injured while working with coupling equipment of all remedies; they still may allege a claim under the FELA. But they will have to prove negligence, *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957), and will be subject to a defense of contributory negligence, which is reasonable when the injury is based on operational matters and not alleged equipment problems.

ARGUMENT

I. SECTION 20302(a)(1)(A) DOES NOT IMPOSE LIABILITY ON A RAILROAD FOR AN INJURY INCURRED BY AN EMPLOYEE WHILE REALIGNING A MISALIGNED DRAWBAR THAT IS NOT DEFECTIVE.

A. The Language Of § 20302(a)(1)(A) Does Not Prohibit Employees From Going Between Cars To Realign Equipment That Is Not Defective.

The SAA is a safety equipment statute. It does not prescribe particular operating procedures for railroads or their employees, and does not bar railroad employees from performing their duties between two stationary railcars. Instead, the Act compels railroads to equip their cars with certain types of couplers: those that will couple together automatically with other cars. The language of § 20302(a)(1)(A) of the SAA simply mandates the use of that equipment.

The precise section of the SAA states that a railroad may use on its lines "a vehicle only if it is *equipped with* . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . . ." 49 U.S.C. § 20302(a)(1)(A) (emphasis added). These words are clearly directed at the type of equipment a railroad car must have. Even the title of the Act refers only to safety appliances and not railroad safety procedures in connection with the use of that equipment. The statute requires certain equipment, which will couple and uncouple automatically without employees going between the cars *during coupling and uncoupling*. It does not in terms prohibit the act of going between stationary cars to align drawbars before or after coupling occurs.

The language of the statute requires couplers that, first, couple on impact without employees having to go between cars, and second, can be uncoupled without employees having to go between cars. *Id.*; see also *O'Don-*

nell v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 387-88 (1949) (adding that couplers must also remain coupled until released). Nothing in that statutory sentence suggests that employees should never have to go between railcars to perform any duties. The language speaks specifically to coupling equipment's performance *during the coupling and uncoupling* of cars.[2] It does not describe how the equipment must function at other times when cars are hundreds of feet apart, and does not imply that employees will never have to *prepare* the equipment to couple—for example, by opening a closed knuckle or aligning a misaligned drawbar.

Section 20302(a)(1)(A) of the SAA was Congress's response to the danger of employees needing to stand between cars while the cars moved. One of the bill's purposes was "to provide against the necessity of the switchmen going in between the cars *to couple and uncouple*." 24 Cong. Rec. 1275 (1893) (statement of Sen. Cullom) (emphasis added). See *infra* at 14-15. The danger of workmen being crushed between two cars during coupling is what § 20302(a)(1)(A) was intended to eliminate. 24 Cong. Rec. 1367 (1893) (statement of Sen. McPherson).[3]

Moreover, the phrase "without the necessity of men going between the cars" is not a flat prohibition against

[2] "[I]t is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them . . . ." *Louisville & Nashville R.R.* v. *Layton*, 243 U.S. 617, 621 (1917).

[3] Section 20302(a)(1)(A) of the SAA has largely accomplished its purpose. In 1890, 369 railroad employees were killed and 7,842 were injured during coupling and uncoupling of railcars. H.R. Rep. No. 1678, 52d Cong., 1st Sess. 2 (1892). In 1993, one hundred years after the passage of the SAA, one railroad employee was killed and 136 were injured while coupling and uncoupling railcars. Accident/Incident Bulletin No. 162, U.S. Dep't of Transp., Fed. R.R. Ass'n Office of Safety, Tables 66 & 67 (June 1994).

any operational procedure that occurs between two railroad cars. Congress's dominant concern was not to eliminate altogether the action of going between the cars, but was instead to describe in the statutory language the process as it existed at the time the Act was passed: the process of coupling and uncoupling cars while standing between two moving railcars.

The Congress of 1893 did not even expressly prohibit employees from going between cars while coupling them: Cars had to be "equipped with couplers coupling automatically by impact, *and which can be uncoupled without the necessity of men going between the ends of the cars.*" 45 U.S.C. § 2 (emphasis added). This Court in *Johnson* v. *Southern Pacific Co.*, 196 U.S. 1, 18-19 (1904), reasonably interpreted that statutory language to apply to both coupling and uncoupling because Congress likely did intend to treat those two processes the same. However, if Congress had meant absolutely to prohibit employees from going between cars, it would have used far more clear language and at least would have connected the coupling process more expressly to the phrase "without the necessity of men going between the ends of the cars."

The stated purpose of the Act is "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce *to equip their cars with automatic couplers* and continuous brakes and their locomotives with driving-wheel brakes." Act of March 2, 1893, ch. 196, 27 Stat. 531 (emphasis added); 24 Cong. Rec. 1246 (1893) (statement of Sen. Cullom) (emphasis added); S. Rep. No. 1049, 52d Cong., 1st Sess. 1 (1892) (emphasis added). That purpose is not served by the interpretation of the statute advanced by the court of appeals in this case.

B. Congress's Concern In Enacting The SAA And § 20302(a)(1)(A) Was To Improve Equipment Installed On Rail Cars, Not To Regulate Employee Operating Practices.

The intent to regulate equipment and not to prohibit an operation is revealed by the words Congress chose and is reinforced by a discussion of the provision as it moved through Congress. The legislative history demonstrates that it was not the purpose of § 20302(a)(1)(A) of the SAA to ban all instances of employees going between railroad cars or otherwise to restrict operating procedures. More specifically, Congress did not focus on preventing employees from going between stationary cars:

> I think very few people have lost their lives by coupling inventions between cars when they are at a standstill, but it is the continuous shifting and moving of cars in which the brakeman is expected to do the work under circumstances of great danger.

24 Cong. Rec. 1367 (1893) (statement of Sen. McPherson). A member of the National Committee on Safety Appliances testified similarly before the Senate Committee on Interstate Commerce regarding uncoupling:

> There [are] a number of devices that enable . . . uncoupling to take place from the side of the car. . . . In a number of these types there are devices on the side of the car by which the knuckle can be opened when the cars are apart, so that switchmen need not go between the cars, never mind how far they are apart. Of course if the cars are a considerable distance apart and are not moving there is no particular danger. He goes in and opens the knuckle with his hand.

Automatic Couplers and Power Brakes: Hearings Before the Senate Committee on Interstate Commerce, 52d Cong., 1st Sess. 14 (1892) (testimony of W.E. Rodgers). In addition, Congress could not have seen the ultimate risk

as railroad employees going between cars because the SAA independently requires cars to be equipped with air brakes, 45 U.S.C. §§ 1, 9 (now codified at 49 U.S.C. § 20302); *Fairport, Painesville & E.R.R.* v. *Meredith*, 292 U.S. 589, 592-93 (1934), that depend on workmen going between stationary cars on the rails to connect the air hoses for the air brakes. See 49 C.F.R. § 218.39(a).

If Congress had intended § 20302(a)(1)(A) to prohibit employees engaged in any aspect of coupling from going between cars, it never would have enacted 49 U.S.C. § 20131. In that section, Congress expressly directed the Secretary of Transportation:

> to prescribe regulations and issue orders that may be necessary to require that when railroad carrier employees (except train or yard crews) assigned to inspect, test, repair, or service rolling equipment *have to work on, under, or between that equipment*, every manually operated switch . . . providing access to the track on which the equipment is located is . . . secured by an effective locking device . . . .

49 U.S.C. § 20131 (emphasis added). While providing for improved safety in these operations, Congress clearly envisioned employees going between cars to perform certain duties.

C. The FRA's Regulations Clearly Permit Employees To Go Between Cars And Thus Reflect Congress's Intent Solely To Regulate Equipment Safety, Not Operations.

Consistent with Congress's expressed intent to regulate equipment, the FRA's regulations demonstrate that operations requiring an employee to stand between two cars are not *per se* impermissible. Current regulations of the FRA provide for railroad employees to go between cars safely to adjust couplers. See 49 C.F.R. §§ 218.22, 218.39(a).

The Department of Transportation, which is the agency charged with enforcing the SAA through the FRA, 49

U.S.C. § 20103(a), quite clearly does not prohibit the act of going between two cars. FRA regulations describe situations in which employees, in the normal course of their duties, must go between two cars to perform certain functions, including adjusting couplers. The agency's interpretation is entitled to weight in determining congressional intent. *Baltimore & Ohio Ry.* v. *Jackson*, 353 U.S. 325, 330 (1957); *Davis* v. *Manry*, 266 U.S. 401, 405 (1925). And the agency's view plainly restricts the scope of § 20302(a)(1)(A) more narrowly than the courts below.

For example, the FRA, regulating operations in a "hump yard," or yard with one elevated track branching into many tracks at a lower elevation, mandates that "[w]hen a train or engine service employee is required to couple an air hose or *to adjust a coupling device* and that activity *will require that the employee place himself between pieces of rolling equipment*," the switch operator must be so notified to prevent injury to the employee between the cars. 49 C.F.R. § 218.39(a) (emphasis added).

In the proposed rulemaking leading to 49 C.F.R. § 218.39(a),[4] the FRA and the Department of Transportation explained the coupling procedure: After a group of cars has gone down the hill at the hump yard into the "bowl tracks" at the bottom, a crew of employees "couples the cars and connects the airhoses between them" so that they will move as a unit. 48 Fed. Reg. 45,272, 45,272 (1983). "In performing these tasks, members of the yard crew *must position themselves between the cars . . . .*" *Id.* (emphasis added). The rule requires that such employees be protected "when engaged in coupling air hoses or adjusting coupling devices, *which activities demand that they place themselves between rolling equipment*. This rule would apply to components of these two general tasks, *e.g., . . . adjusting drawbars.*" *Id.* at 45,273 (emphases added).

[4] The final, unchanged rule became effective March 23, 1984. 49 Fed. Reg. 6495, 6497 (1984).

Another FRA regulation provides protection for utility employees "working on, under, or between railroad rolling equipment." 49 C.F.R. § 218.22(c)(5). The description in the Federal Register of the final rule states that it was promulgated to protect railroad employees "whose activities require them to work on, under, or between [rolling] equipment" on a variety of jobs. 58 Fed. Reg. 43,287, 43,288 (1993).

Thus, the FRA plainly envisions that employees must go between railroad cars during the course of their duties and that to do so does not constitute a *per se* violation of the statute. Instead, the FRA has provided for improved safety requirements when employees must go between cars to adjust couplers or to perform other jobs. Unless the FRA's regulations are invalid, the SAA does not bar altogether the operation of going between the cars.

D. This Court's Decisions Interpreting § 20302(a)(1)(A), Particularly *Affolder*, Clearly Show That The Provision Does Not Prohibit An Employee From Realigning A Drawbar That Is Not Defective.

This Court has interpreted the SAA as a safety equipment statute, not an operational statute. "Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment 'not from the position the employee may be in or the work which he may be doing at the moment when he is injured.'" *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949) (quoting *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 16 (1938)). The SAA's "prime purpose" is "the protection of employees and others *by requiring the use of safe equipment.*" *Lilly* v. *Grand Trunk W.R.R.*, 317 U.S. 481, 486 (1943) (emphasis added).

Consistent with that characterization of the SAA, the necessity of manual adjustment of a drawbar is not a *per se* violation of the Act. That argument for liability

was effectively rejected by this Court in *Affolder* v. *New York, Chicago & St. Louis Railroad*, 339 U.S. 96 (1950). In *Affolder*, two cars had failed to couple, and the plaintiff lost his leg in his attempt to board and stop the cars from rolling down the track. *Id.* at 97. The *Affolder* Court held that

> to equip a car with a coupler which failed to perform properly "in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom" . . . .
>
> *Of course this assumes that the coupler was placed in a position to operate on impact.* Thus, if "the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened," the railroad had a good defense.

Id. at 99 (emphasis added) (citations omitted). Justice Jackson, dissenting over the lack of clarity of the jury instructions, agreed with the majority's statement of the law: "Before a failure to couple establishes a defective coupler, it must be found that it was *properly set so it could couple. If it was not adjusted as such automatic couplers must be, of course the failure is not that of the device.*" *Affolder*, 339 U.S. at 101 (Jackson, J., dissenting) (emphasis added); see also *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434 (1949).

This Court in *Affolder* did not limit its holding merely to the positioning of the knuckles, which was at issue in that case. Instead, the Court referred more generally to placing the coupler "in a position to operate on impact." *Affolder*, 339 U.S. at 99. The Court noted that counsel for both parties had argued that the issue "was whether, *after* the couplers were placed in *open or proper position*, they failed to couple automatically on impact." *Id.* (emphases added). The Court recognized that the need to "position" a coupler to operate on impact does not violate the SAA; the Court's analysis contemplates normal

manual adjustment of couplers to permit automatic coupling to occur on impact.

Although the Court did not reach the precise question of drawbar misalignment, the *Affolder* requirement of "properly set" logically includes properly aligned drawbars. A misaligned drawbar on a coupler is directly analogous to an unopened knuckle on a coupler—they are both frequent causes of failed coupling that normally are not due to defective machinery. *Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 132 (3d Cir. 1991). In both cases, a failure to couple may not be caused by defective equipment but by vibration of the car or human error in failing to open a knuckle or align a drawbar, and is therefore not a violation of the SAA.[5]

Given that the Court's reasoning in *Affolder* allows a railroad to present a defense that its equipment was non-defective and simply not set properly, the validity of that defense in any given case is a question of fact for the jury to decide. *Atlantic City R.R.* v. *Parker*, 242 U.S. 56, 59 (1916); *San Antonio & Aransas Pass Ry.* v. *Wagner*, 241 U.S. 476 (1916); *cf. Myers* v. *Reading Co.*, 331 U.S. 477, 482-84 (1947) ("A railroad subject to the [SAA] may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which caused the injuries . . . was not an 'efficient' hand brake.").

In *San Antonio Railway*, for example, this Court found that there was enough evidence for the jury to have concluded that certain couplers were "in bad repair" and "*for*

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[5] The SAA imposes an absolute duty on railroads to comply with its provisions, and a railroad's exercise of care is irrelevant. *See, e.g., O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390-91 (1949); *Myers* v. *Reading Co.*, 331 U.S. 477, 482 (1947); *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938). No matter how strict that requirement may be, the railroad still must retain the ability to present the affirmative defense that it *did* comply with the mandate of the SAA and its equipment performed as required.

this reason they did not measure up to the [SAA] standard . . . for such equipment." *San Antonio Ry.*, 241 U.S. at 482-83 (emphasis added). This Court in *Atlantic City* stated clearly that "[i]f couplers failed to couple automatically upon a straight track it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, *in the absence of any explanation believed by them,* the failure indicated that the railroad had not fully complied with the law." *Atlantic City,* 242 U.S. at 59 (emphasis added). Clearly, the Court envisioned that the railroad is permitted to offer an explanation to the jury as to why a coupler failed, and the jury would weigh the evidence and decide whether the failure was caused by a defect in the equipment or a mere operational failure.

In the instant case, because the trial court directed a verdict against petitioner on the issue of liability, petitioner had no such opportunity to present to the jury the uncontested evidence that its equipment was nondefective and complied with SAA standards. This Court has never stated that the mere failure of a coupler to perform sustains a claim that the SAA was violated. See *San Antonio Ry.*, 241 U.S. at 484.[6] The defendant railroad should have the opportunity to show that a factor other than equipment failure or defect caused the failure to couple, or, in this case, caused the drawbar misalignment.

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[6] The evidence in this case does not even demonstrate a failure to perform. The coupler on the car at issue was in fact fastened to another car just before respondent attempted to realign the drawbar. *See supra* at 6. And there was no attempt to couple the drawbars before the accident because respondent decided to realign the drawbar based on his perception that it was "slued." This demonstrates how far the respondent's and court of appeals' theory of liability strays from the essential mandate and purpose of § 20302(a)(1)(A).

E. Respondent's Injury, Which Was Based Solely On A Claim That The SAA Was Violated By A Misaligned Drawbar, Is Not Covered By The Act When The Drawbar Was Not Defective.

1. From a practical standpoint, before two railroad cars can be coupled, the coupling equipment must be properly positioned: drawbars must be in alignment and knuckles must be open so that coupling can take place. In this case, a drawbar was misaligned so that the two cars apparently would not have coupled on impact, and the bar had to be aligned manually. The drawbar misalignment, however, was caused by normal movement of the railroad car, and not by any defect or malfunctioning of the equipment.

In relevant part, a railroad car must be "equipped with . . . couplers coupling automatically by impact." 49 U.S.C. § 20302(a)(1)(A). The car involved in respondent's accident was indisputably so equipped. The misaligned drawbar involved in the accident was misaligned due to normal operation of the car, and was not defective. Petitioner's evidence and offers of proof to that effect were undisputed at trial.

The trial court erred when it excluded evidence that the misaligned drawbar was not caused by defective equipment, and erred by denying petitioner's motion for directed verdict on the issue of its liability under the SAA. The modern and unbroken trend of federal appellate court decisions concurs that "the [SAA] was created to reduce the risks associated with coupling rail cars and not to require that drawbars be aligned perfectly at all times." *Goedel* v. *Norfolk & W. Ry.*, 13 F.3d 807, 812 (4th Cir. 1994).[7]

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[7] *See also Kavorkian* v. *CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994); *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado* v. *Missouri Pac. R.R.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480

The statute requires automatic *coupling*, not automatic *realignment* which did not exist in 1893 and is only in experimental use today. Respondent's standard would penalize railroads for normal operations unquestionably in compliance with the SAA's equipment requirements.

2. The existence of misaligned drawbars does not mean that coupling equipment is defective. Drawbars often become misaligned "by the normal jarring and vibrations of the railroad car or when the car is uncoupled on a different track . . . ." *Kavorkian* v. *CSX Transp. Inc.*, 33 F.3d 570, 575 (6th Cir. 1994); *United Transp. Union* v. *Lewis*, 711 F.2d 233, 235 & n.5 (D.C. Cir. 1983). Moreover, this Court has recognized that, as a practical necessity, drawbars must have lateral play. *Atlantic City R.R.* v. *Parker*, 242 U.S. 56, 59 (1916). In order for railroad cars to transverse a curved track without derailing, the drawbars holding those cars together must have some lateral play. Normal drawbar misalignment is both essential and beneficial to the proper functioning of railroad cars; it does not constitute a defect.

Inevitably, then, nondefective railroad car drawbars will occasionally need alignment. The alignment of drawbars is still required from time to time, even with modern coupling equipment. This alignment can only be accomplished by a railroad employee going between the rails to move the drawbar manually. *Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128, 130 (3d Cir. 1991); *Kavorkian*, 33 F.3d at 571. In fact, equipment for automatic alignment remains experimental and is far from common usage in the industry. Br. of Assoc. of Am. Railroads as *Amicus Curiae* in Supp. of Pet. at 10-11; *Goedel*, 13 F.3d at 809; *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823, 825 & n.2 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Metcalfe* v. *Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892, 896 n.2 (10th Cir. 1974); *Reed*, 939 F.2d at 130 & n.1.

U.S. 932 (1987); *cf. United Transp. Union* v. *Lewis*, 711 F.2d 233 (D.C. Cir. 1983).

The Congress of 1893 could not have meant to mandate the use of nonexistent equipment and to require that drawbars could never be manually aligned in preparation for coupling. This Court should refuse to "accept[] a reading of section 2 that would be tantamount to a pronouncement that 99% of all railroad cars violate section 2—and have done so for the entire 90 years the Act has been in effect." *United Transp. Union*, 711 F.2d at 251 n.39.

The question at the core of this case is whether the existence of nondefective misaligned drawbars violates the SAA as written, not whether railroads should develop new technology to align drawbars automatically. See *United States* v. *Seaboard Air Line R.R.*, 361 U.S. 78, 82 (1959) ("[I]t is not for courts to determine in particular cases whether this safety measure is or is not needed. Congress determined the policy that governs us in applying the law."). Indeed, this Court has held that it was not the intent of the SAA to require the *invention* of equipment, but instead to require the installation of pre-existing safety appliances. *Southern Ry.* v. *Crockett*, 234 U.S. 725, 737 (1914). In sum, "[i]f it is normal for nondefective automatic couplers to become misaligned as a part of ordinary railyard operations, then it is simply not reasonable to hold that such misalignment amounts to a violation of the Act," creating *per se* liability. *Lisek*, 30 F.3d at 830-31.

3. The evidence at trial, and petitioner's offers of proof made out of the presence of the jury, demonstrated that petitioner had the proper equipment in place at the time of the accident and that automatic couplers were in fact properly installed on the railroad car. Respondent presented no contrary evidence that the coupler was defective, and, in fact, all of the evidence regarding the condition of the coupler tended to show that no defect existed. Accordingly, petitioner was entitled to judgment as a matter of law.

Walter A. Miller, Jr., General Foreman at Norfolk Southern Corporation, inspected the railroad car and coupler, which respondent claims caused his injury, less than two hours after the accident. J.A. at 10, 21. Mr. Miller, with 20 years of experience in the railroad industry, concluded that the coupler was not defective, and met the Association of American Railroads guidelines published in its Interchange Rules. *Id.* at 10-11, 21. When Mr. Miller made an offer of proof out of the presence of the jury, he reiterated that he found no mechanical defect in the drawbar of the coupling mechanism on the car involved in respondent's accident. *Id.* at 21.

Respondent did not dispute petitioner's evidence at trial tending to show that the drawbar at issue was non-defective. In his responses to deposition questions, respondent stated that he did not know what caused the drawbar's misalignment and was unaware whether it was due to a factor other than equipment failure or defect. R. at C291. Respondent declared that he did not know if there was anything about the drawbar's alignment that indicated to him that it was defective or needed repair. *Id.* at C292. He saw nothing to indicate that the misalignment was due to a factor other than a defect, nor did Mr. Fauver mention anything to respondent that indicated that the misalignment was due to something other than a defect. *Id.*

In this case, there was no prior impact or failed coupling before the accident occurred. Instead, respondent and Conductor Fauver saw the misaligned drawbar, decided that it would prevent coupling, and tried to straighten it before any attempt at coupling. Slued drawbars requiring manual alignment can occur whether or not there was an attempt to couple; this factor should not be determinative in deciding whether the SAA has been violated. It should not make a difference to a railroad's liability if its employee decides that a drawbar is sufficiently straight to couple and makes a failed attempt, and *then* is injured

in attempting to align the bar, or if the employee judges that the drawbar is too slued to couple and is injured while aligning.[8]

F. Construing The SAA Not To Cover Respondent's Claim Will Not Deprive Employees Of A Remedy For Any Injuries Caused By A Railroad's Negligence In Its Operating Procedures For Aligning Drawbars.

Permitting railroads to present a defense that their equipment was not defective will not deprive railroad employees injured on the job, as the respondent allegedly was, of a remedy. Where a railroad is negligent in its operations or in failing to correct an equipment malfunction or in failing to comply with SAA standards, the railroad still would be liable under the FELA.[9] If this Court

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[8] The Illinois Appellate Court in this case stated that "[a]ll a plaintiff such as Hiles is required to show in order to obtain a directed verdict on the issue of liability is that: (1) railroad cars failed to couple automatically and (2) he went between the cars and was injured while trying to straighten a misaligned drawbar." Pet. App. at 7a. Respondent, too, advocated this position. In his motion for directed verdict, he stated that "the injured workman need only prove that he went between the cars after they failed to automatically couple, and that he was injured while aligning a misaligned drawbar." R. at C552. The trial court concluded that Hiles had met those requirements and was therefore entitled to a directed verdict. However, it is apparent from the record below—and undisputed by respondent—that there was *no* attempt to couple the railroad cars on the morning of July 18, 1990. Respondent has not even met his own, erroneous legal standard of showing a violation of the SAA, or demonstrating a defect in the drawbar.

[9] If a drawbar were *frozen* out of alignment, for example, that would certainly be a coupling defect and the railroad would face liability for an injury associated with that defect. *See Goedel* v. *Norfolk & W. Ry.*, 13 F.3d 807, 811 (4th Cir. 1994). Couplers somehow incapable of coupling on impact, perhaps those with broken or missing knuckles or knuckles that could not maintain a coupling, would be defective as well. FRA regulations define a defective coupler as one with "a coupler shank that is bent out of alignment to the extent that the coupler will not couple auto-

finds that railroads are strictly liable for all injuries incurred when drawbars are misaligned, then contributorily negligent railroad employees will be able to elude any evidence of their negligence at trial by suing exclusively under the SAA, as respondent has done here. See 45 U.S.C. § 53 (damages diminished under the FELA by employee's contributory negligence). Given that respondent's claim ultimately is based on operating procedures and not on equipment failure, the statutory scheme will be better served by permitting contributory negligence to be an issue in these cases.

Respondent declares that "the prime purpose of the SAA is the protection of employees from injury or death," and that "[t]he object of the SAA, being remedial and humanitarian, should not be construed as to defeat the above purpose." Resp. Br. in Opp. at 3. It is surely true that the SAA was passed to protect railroad employees from injury or death on the job, but that policy does not mean that the Act's protections are limitless, nor that the Act's plain language should be ignored so that employees prevail in every suit brought under the SAA. Nor does it mean that railroads must be deprived of the ability to raise the affirmative defense that they in fact complied fully with the statute.

FELA, intended to be a "broad remedial statute," is liberally construed in favor of railroad workers. *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 562 (1987). In a FELA action, the railroad is liable if its

matically." 49 C.F.R. § 215.123. If a coupler is warped out of shape as the regulation contemplates, then it is clearly structurally and mechanically defective—unlike simple misalignment which the employees can manually correct. In addition, if an injured employee could show that the railroad negligently failed to educate him regarding misaligned drawbars so that he was trying to realign one when it was unnecessary, or had failed to train him on the safest methods of realignment, then a railroad could be liable under the FELA for injuries resulting from those violations. 45 U.S.C. § 51. However, that is not the case here. Tr. at 160.

negligence "played any part, even the slightest, in producing the injury." *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957). A violation of the SAA creates liability under FELA if the violation contributes to the injury, regardless of whether that injury was one "the statute sought to prevent." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 433 (1958). The employer owes the employee under FELA "the duty of complying with his statutory obligations." *Id.* at 439. However, if those statutory obligations are expanded beyond their purpose solely to guarantee a remedy, the employer will be faced with a standard far beyond that which Congress intended. Railroad employees justifiably have substantial protection under FELA, but to construe the SAA to deny railroads the legitimate defense that they have not in fact violated the statute is unnecessary for workers' protection.

To be sure, this Court has interpreted the SAA broadly regarding those employees to whom railroads owe a duty under the Act. *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 522-23 (1949); *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 16 (1938); but see *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 167 (1969). However, the SAA should not be construed to state that a railroad cannot present evidence that its equipment was not defective, particularly if that construction goes against the plain language and regulatory understanding of the statute.[10] The SAA protects railroad employees from harm, but it is fundamentally about safety equipment standards for the railroads and carries no presumption of creating liability for every injury in the workplace. The double protection is unnecessary, and particularly inappropriate in this case where respondent *chose* to sue solely under the SAA and

[10] It is inconsistent with Congress's scheme that courts should interpret the concept of a mechanical defect loosely, particularly when the "defect" respondent alleges to exist was not a defect in 1893, and to allow a mere operational matter to masquerade as a defect.

to forgo his right to state a separate claim based on negligence for violation of the FELA.

CONCLUSION

This Court should reverse the judgment of the Appellate Court of Illinois, Fifth Judicial District.

Respectfully submitted,

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No. 95-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,
v.
WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a railroad car on which the drawbar is so misaligned as to prevent automatic coupling violates Section 2 of the Safety Appliance Acts (49 U.S.C. § 20302(a)(1)(A)).

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BRIEF FOR RESPONDENT

FACTS AND BACKGROUND

The salient facts in this case are unrefuted. In its opening statement, the railroad conceded that the Respondent and his co-worker had to go between the cars in an attempt to line up the drawbars so that the cars could be coupled together (J.A. 12).[1] The particular car in question couldn't couple unless they "slued the drawbar over and straightened it out." (J.A. 14). The Respondent was attempting to pull the drawbar, while his co-worker was pushing on it. (J.A. 17-18). Both persons were between the rails and the cars (J.A. 16-18). The railroad conceded that manual alignment of a drawbar requires an

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[1] The drawbar is a heavy bar located at the ends of rail cars to which the cars couple and uncouple. The end of the drawbar is known as a knuckle which consists of a clamp mechanism that opens and closes to allow the coupling to occur.

employee to go between the cars to straighten it out. (Pet. Br. 3).[2]

Railroad cars attach to each other through a coupling mechanism which is located at either end of each car. The coupling mechanism consists of a drawbar and a knuckle that connects with an adjacent car. A pin inside the coupler knuckle locks the knuckle in a closed position. The adoption of the Federal Safety Appliance Acts (hereinafter "SAA")[3] prompted the railroads to begin using devices such as pin lifters and uncoupling levers (which are operated from the side of a railroad car to open a knuckle for the purpose of separating railroad cars or preparing the cars for a coupling). Such devices assist in the opening of knuckles without the necessity of employees going between the railroad cars. In 1893, the time of passage of the SAA, these devices were not in widespread use. Using a pin lifter or uncoupling lever, the pin can be removed and the knuckle can be opened without having to step between the rails. If the couplers on both cars are set properly so that the drawbar, which rests on a pivot to allow the car to round curves without derailing, is aligned and at least one of the knuckles is open, the two cars will connect automatically upon impact.

Therefore, two things must occur to effect a coupling.[4] First, the knuckles (drawhead, or coupler) must be open;

[2] The Petitioner (Pet. Br. 6) suggests that the uncoupling of the car in question "must have taken place on a curve where the drawbars would have remained misaligned when the car stopped." There is no direct evidence in the record that this in fact occurred. For purposes of the SAA, it doesn't matter how the drawbar became misaligned.

[3] The SAA were originally codified at 45 U.S.C. §§ 1-16. Section 2 is currently codified at 49 U.S.C. § 20302(a)(1)(A). Wherever § 2 of the SAA is cited in this Brief, it refers to § 2 of the Act of March 2, 1993, codified at 45 U.S.C. § 2 as originally enacted, and as codified in 1994.

[4] It has been argued that Section 2 of the SAA only mandates that cars be *uncoupled* without the necessity of persons going between the ends of the cars. However, the Court has long held that the language also applies to *coupling*. *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 18-19 (1904).

and, secondly, both drawbars must be positioned in line with each other.

It is undisputed that, when a drawbar moves far out of alignment, this precludes automatic coupling and then it becomes necessary for the employee to go between the cars to adjust the drawbar. That is precisely what happened in this case. Technology exists, but the railroad industry has not adopted an automatic realignment device as part of the coupling equipment. As pointed out in the Association of American Railroads' *amicus* brief at 10-11, in the 1960's the railroad industry began using an automatic realignment device which was not completely successful. However, there is no indication that the industry attempted to improve it any further. The freight railroads created this overall problem because of the changes in the type of equipment being used today. When the SAA was enacted, the length of box cars was 40 feet. These relatively short cars did not develop problems of misaligned drawbars because the cars could easily traverse a curve with little or no play in the drawbar. However, with the increases in car lengths to approximately 90 feet, this necessitated the use of longer drawbars. The use of longer drawbars has, in turn, resulted in misalignment to occur in some situations. However, the industry has not taken any effective actions to eliminate the hazard created by the use of the longer cars in coupling operations. It should be noted that the hazard does not exist in passenger service because couplers on many passenger cars are equipped with devices which automatically center the drawbar, and the drawbars on such cars are significantly shorter.

The safety issues facing Congress at the time of the adoption of the SAA were not that the predominantly used link and pin type coupler was defective, nor that

the intermingling of the various types of couplers were dangerous because they were defective. Rather, their continued use in railroad operations created an unsafe condition that needed to be corrected. Congress intended to eliminate the dangers attendant to working between cars, and it didn't matter whether or not the equipment was defective. These dangers are what Congress addressed, not the type of equipment used to accomplish the mandate. If a railroad fails to place the safety equipment on the cars to carry out this goal, then it is liable under the SAA.

How does the Court best carry out Congress' intent to protect the worker who is required to go between rail cars to effect a coupling? It should not restrict the reading of the statute in such a way that loophole will exists for carriers to avoid liability to an injured employee who was performing his/her work as required by the railroad.

SUMMARY OF ARGUMENT

A. The SAA Is Violated If A Misaligned Drawbar Requires Manual Adjustment And It Is Necessary To Place One's Body Between The Ends Of Cars In Order To Make Such Adjustment

Throughout the trial, the Petitioner attempted to establish that the misalignment of the drawbar was not caused by a defect in the equipment (See Pet. Br. 7). The words of Section 2 of the SAA do not state that the coupler must be defective in order for there to be a violation. This conclusion was reached by the Court in *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 99 (1949). If the couplers do not couple automatically by impact (for whatever reason, whether defective or not), or cannot be uncoupled without the necessity of employees going between the ends of cars, then Section 2 of the SAA is violated.

Section 2 of the SAA imposes certain absolute duties upon railroads to outfit their cars with safe equipment.

> "[A] failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence."

O'Donnell v. Elgin J. & E. Ry. Co., 338 U.S. 384, 390 (1949).

The Court has enunciated two ways in which a plaintiff can establish the railroad's liability for an accident involving a coupling mechanism. The first is to provide evidence that two cars failed to couple automatically upon impact. In *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S., at 98, the Court held that the plaintiff could meet his burden under § 2 by showing a failure to couple automatically upon impact. The railroad's duty to have couplers which couple automatically upon impact "is an absolute one requiring performance 'on the occasion in question.'" *Id.* The plaintiff is not, therefore, required "to show a 'bad condition' of the coupler." *Id.* at 99. Failure of the equipment itself is sufficient for liability, and there is no need, in addition, to establish a defect. The second method of establishing a violation of the SAA is to show a defect in the coupling equipment. Although a plaintiff is not required to prove that the equipment was defective, see *Affolder*, the evidence that an employee is required to step between the cars because of defective equipment can establish liability.

The Court has allowed only one exception to the above requirements. It involves a situation where the employee does not ensure that the coupler was in the open position before impact. In *Affolder*, the Court stated that liability under § 2 "assumes that the coupler was placed in a position to operate on impact." *Id.* at 96. The coupling, which may be accomplished without a person going be-

tween cars, should not be extended to require alignment of the drawbar (which cannot be performed without a person going completely between the cars) as a pre-condition to a violation of § 2.

B. The Legislative History Supports The Statutory Provision That It Is Not Necessary To Prove A Defect For A Violation Of The SAA.

The Court stresses the importance of statutory policy. See *Bruce Babbitt, et al. v. Sweet Home Chapter of Communities For a Great Oregon, et al.*, 63 U.S.L.W. 4665, 4668 (U.S. June 27, 1995). The Court has made it clear that the prime purpose of the SAA is the protection of employees from injury or death. See *B. & O. R.R. v. Jackson*, 353 U.S. 325 (1957); *Gentle v. Western & A. R.R.*, 305 U.S. 654 (1939). The object of the SAA, being remedial and humanitarian, should not be construed as to defeat the above purpose. This certainly would result if the Petitioner's views were adopted.

Throughout the entire deliberations by Congress on the SAA, its focus was solely on uniformity of the couplers, and the dangerous increase in injuries, if they were not automatically uncoupled and coupled. There was absolutely no suggestion that there be an additional condition imposed to first establish a defect before a violation can occur. See e.g., *Automatic Couplers and Power Brakes: Hearings Before the Senate Committee on Interstate Comcerce on S. 811, S. 893 and S. 1618*, 52nd. Cong. 1st Sess.; S. Rep. No. 1049 (1892).

The legislative history fortifies the statutory provision that it is not necessary to prove a defect for a violation of Section 2 of the SAA to occur. Congress, in the automatic coupler provision, wanted one result—to obviate the necessity of persons going between cars for coupling and uncoupling. H.R. Rep. 1678, 52nd Cong. 1st Sess. 3 (1892). There is not one word in the hearings, the Congressional reports, nor the Congressional floor debate

to the effect that the coupler must be defective before a violation exists.

The spokesperson for the railroad industry at the Congressional hearings in 1892, Mr. H.S. Haines, Vice-president of the American Railway Association (predecesor to the Association of American Railroads) stated the problem succinctly:

> It is not a question as to whether we should have a uniform coupler or not. The question is whether we shall have that kind of a coupler which will protect men's lives and protect them from personal injury, and that is the yardstick that is to be applied to all proposed legislation.

S. Rep. No. 1049, 52nd Cong. 1st Sess. 40 (1892).

Mr. H. S. Haines further testified:

> What the man who manipulates the coupler wants is that every coupler . . . shall have what we call the release rod, that controls the locking device, so arranged that he can stand *outside* of that car and operate it.

Id. at 41. (Emphasis Added).

The Senate floor debate adds further clarification:

> This bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars.

24 Cong. Rec. 1280 (1893).

In *United Transportation Union v. Lewis*, 711 F2d 233, 236 fn. 6 (D.C. Cir. 1983), the panel, in which Justice Ginsburg was a member, analyzed the legislative history and stated that:

> While an action [would lie] for any injuries sustained in performing the manual preparation, because cars have failed to couple automatically, . . . this does not make the coupler "defective" within the meaning of FRA regulations. . .

In that case the court recognized that an FRA regulation may not be violated, but an action could still lie for injuries sustained in performing the manual preparation because the cars failed to couple automatically. *Id.* at 236 fn. 6. Therefore, as reasoned in *Lewis*, a violation of the SAA does not necessarily mean that a FRA regulation issued pursuant to the SAA is violated. Also, the court said that, although there is no separate prohibition for the act of going between the cars, the railroad is still liable because if the employee must go between the cars to effect a coupling, then "there has been a failure to provide equipment that functions as the statute commands." *Id.* at 251.

C. This Court's Analysis Of The SAA Confirms That It Is Not Necessary To Prove A Defect Exists In The Coupler To Establish A Violation

The Court has reviewed § 2 of the SAA a limited number of times. In each case it upheld the basic purpose of the Act, to protect an employee from having to go between cars to assist in coupling or uncoupling. As stated by this Court on several occasions, the *condition* of the equipment is not the issue. Rather, it is whether the couplers *performed* as required by the SAA.

The two concepts which emerge from the Court's analysis of § 2 of the SAA are:

1. If the equipment failed to perform as required by the statute, this in and of itself is an actionable wrong.
2. Section 2 mandates that the couplers *perform* as required, and the *condition* of the coupler is irrelevant in determining whether a violation has occurred. Any requirement that a coupler must be properly set as a precondition to liability recognizes that such an act can be accomplished outside the cars without the necessity of a person going between them.

In *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. at 99, the Court held that if a car failed to perform properly in a switching operation, this was a violation of the Act. The only way a carrier could avoid liability is if the coupler had not been properly opened. *Id.* The Court pointed out that the plaintiff did not have to show a bad condition of the coupler. *Id.* at 98.

In *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430, 433-434 (1949), the Court held that the absence of a defect cannot aid the railroad if the coupler was properly set and failed to couple. In *O'Donnell*, 338 U.S. at 393, the Court said that evidence of defect added nothing to a claim under SAA, because it was the failure of the equipment to perform as Congress mandated which was violative of the Act.

The Petitioner argues that it need not develop technology to align drawbars automatically (Pet. Br. 22-23). The Court in *O'Donnell* answered this issue and said:

> A defendant cannot escape liability for a coupler's inadequacy by showing that too much was demanded of it, nor by showing that while the coupler broke it had been properly manufactured, diligently inspected and showed no visible defect. These circumstances do go to the question of negligence; but, even if a railroad should explain away its negligence, that is not enough to explain away its liability if it has violated the Act.

338 U.S. at 393-394.

In addition to *O'Donnell*, the Court in both *Carter* and *Affolder* eliminated all requirements of negligence or fault in establishing a violation of the SAA. These cases recognize that negligence would be improperly introduced into the cases if the railroad could defend against a violation of the SAA by evidence of alleged reasons why the coupling would not occur in a particular set of circumstances.

ARGUMENT

I. THE SAA IS VIOLATED IF A MISALIGNED DRAWBAR REQUIRES MANUAL ADJUSTMENT AND IT IS NECESSARY TO PLACE ONE'S BODY BETWEEN THE ENDS OF CARS IN ORDER TO MAKE SUCH ADJUSTMENT

Throughout the trial, the Petitioner attempted to establish that the misalignment of the drawbar was not caused by a defect in the equipment (See Pet. Br. 7). The words of Section 2 of the SAA do not state that the coupler must be defective in order for there to be a violation. This conclusion was reached by the Court in *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. at 99. If the couplers do not couple automatically by impact (for whatever reason, whether defective or not), or cannot be uncoupled without the necessity of employees going between the ends of cars, then Section 2 of the SAA is violated.

Each case cited by the Petitioner in its brief at p. 17 in support of its position, that a violation of the Safety Appliance Acts results from the unlawful use of defective equipment, is distinguishable. The straightforward response to those cases is that neither one involved § 2 of the SAA. Also, in neither case did the Court state that proof of a defect was a condition precedent to establishing liability. See *Myers v. Reading Co.*, 331 U.S. 469, 482-483 (1947) where the Court said that a non efficient hand brake may be shown either by proving that (1) a defect exists, or (2) failure of the equipment to function as intended. Clearly, it is permissible for a Plaintiff to show a defect in proving a violation of Section 2 of the SAA, but it does not follow that the Plaintiff is required to prove a defect in order to establish the violation. All that is necessary is that the equipment does not function as required by the law.

The railroad argues (Pet. Br. 11-13) that the statute does not apply in situations where the cars are stationary

and employees attempt to align drawbars before or after an attempted coupling occurs. It states that the Act is applicable only *during* the coupling and uncoupling, not preparatory thereto. The Court addressed this point in *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949). There, the railroad also argued that the power brake law was not designed to protect employees from *standing* trains. The Court stated that it did not agree with the lower court's holding that the object of the SAA was not to protect employees from standing but from moving trains. It said:

> We do not view the Act's purpose so narrowly. It commands railroads not to run trains with defective brakes.

Id. at 522

The SAA imposes certain absolute duties upon railroads to outfit their cars with safe equipment.

> [A] failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence.

O'Donnell v. Elgin J. & E. Ry. Co., 338 U.S. at 390. "Once the violation is established, only causal relation is an issue." *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949).

The Court has enunciated the way in which a plaintiff can establish the railroad's liability for an accident involving a coupling mechanism. In *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. at 98, the Court said that the plaintiff could meet his burden under § 2 by showing a failure to couple automatically upon impact. The railroad's duty to have couplers which couple automatically upon impact "is an absolute one requiring performance 'on the occasion in question.'" *Id.* The plaintiff is

not, therefore, required "to show a 'bad condition' of the coupler." *Id.* at 99. Failure of the equipment itself is sufficient for liability, and there is no need, in addition, to establish a defect. Although a plaintiff is not required to prove that the equipment was defective, see *Affolder*, the evidence that an employee is required to step in between the cars because of defective equipment can be a means to establish liability. In *San Antonio & Arkansas Pass Ry. Co. v. Wagner*, 241 U.S. 476, 483-84 (1916), "evidence of bad repair in the equipment" was sufficient to establish liability and thus, the Court stated, "[w]e need not in this case determine . . . that the failure of a coupler to work at any time sustains a charge that the Act has been violated."

The Court has allowed only one exception to the above requirements. It involves a situation where the employee does not ensure that the coupler was in the open position before impact. In *Affolder*, the Court stated that liability under § 2 "assumes that the coupler was placed in a position to operate on impact." 99 U.S. at 96. The open position of the coupler, which may be accomplished without a person going between cars, should not be extended to require alignment of the drawbar (which cannot be performed without a person going completely between the cars) as a pre-condition to a violation of § 2.

II. THE LEGISLATIVE HISTORY SUPPORTS THE STATUTORY PROVISION THAT IT IS NOT NECESSARY TO PROVE A DEFECT FOR A VIOLATION OF THE SAA

Throughout the entire deliberations by Congress on Section 2 of the SAA, its focus was solely on uniformity of the couplers, and the dangerous increase in injuries, if they were not automatically uncoupled and coupled. There was absolutely no suggestion that there be an additional condition imposed to establish a defect for a violation to occur. See *Automatic Couplers and Power Brakes: Hearings Before the Senate Committee on Inter-*

state Commerce on S. 811, S. 893 and S. 1618, 52nd Cong. 1st Sess.; S. Rep. No. 1049 (1892).[5]

The Court stresses the importance of statutory policy. See *Bruce Babbitt, et al. v. Sweet Home Chapter of Communities For A Great Oregon, et al.*, 63 U.S.L.W. 4665, 4668 (U.S. June 27, 1995). The Court has made it clear that the prime purpose of the SAA is the protection of employees from injury or death. See *B. & O. R.R. v. Jackson*, 353 U.S. 325 (1957); *Gentle v. Western & A. R.R.*, 305 U.S. 654 (1939). The SAA, being remedial and humanitarian, should not be construed as to defeat the above purpose. This certainly would result if the Petitioner's views were adopted.[6]

The legislative history fortifies the statutory provision that it is not necessary to prove a defect for a violation of Section 2 of the SAA to occur. Congress, in the automatic coupler provision, wanted one result—to obviate the necessity of persons going between cars. H.R. Rep. 1678, 52nd Cong. 1st Sess. 3 (1892). There is not one word in the hearings, the Congressional reports, nor the Congressional floor debate to the effect that the coupler must be defective before a violation exists. The Petitioner undertakes a selective analysis into the legislative history in which it ignores the central policy expressed throughout the SAA—to protect the worker.

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[5] The Senate hearings were annexed as part of the Senate Report. Therefore, in referring to the Senate hearings, the Senate Report will be cited *infra*.

[6] For obvious reasons the Petitioner seeks to have the Court impose a restrictive reading upon the statute in question. (Pet. Br. 11-12, 14). It argues that the statutory language should be limited to the actual moment that the coupling or uncoupling occurs, and thereby exclude the process of adjusting a misaligned drawbar so that the coupling could actually occur. (Pet. Br. 11-12). Respondent submits that if Congress had intended to limit § 2 to moving equipment, it would have specifically inserted the word in 1893 upon passage or in 1994 the most recent codification of the SAA.

Congress was certainly cognizant of the problem and wanted to eliminate the possibility of casualties resulting from persons placing themselves between ends of cars. The following exchange in the Senate hearings between the author of the bill, which in part became 45 U.S.C. § 2, and the Chairman of the Senate Interstate Commerce Committee illustrates this concern:

> The CHAIRMAN. Suppose your bill, Senate bill 1618, were passed and becomes a law. Will there be, under any circumstances, any necessity for a switchman *to go between the cars at all* in order to couple or uncouple the cars?
>
> Mr. RODGERS. . . . The law provides that there shall not be. They have to adopt a coupler with such details that it will not.
>
> . . . .
>
> The CHAIRMAN. Now, if the technical provisions of that law are preserved, the railroads in all cases will be required to provide such a coupler as will obviate the necessity of the switchman going between the cars?
>
> Mr. RODGERS. They will; that is in special phraseology:
>
> Shall be equipped with automatic couplers so constructed as to couple by impact with the next car without the necessity of a person going between the cars, and so constructed as to be uncoupled without the necessity of a person going between the cars.
>
> . . . . There is a number of devices that enable this uncoupling to take place from the *side of the car* and it is better that it should be. (Emphasis Added).

S. Rep. No. 1049, *supra* at 14.

Congress was concerned about the hazards of going between the ends of the cars to effect coupling or uncoupling, even with the already-in-use automatic coupling systems. Even the industry spokesperson acknowledged that the intent of the legislation was to protect the worker

from personal injury. *Id.* at 40. The interpretation in recent years by the railroads, and in this litigation, is different from what the industry represented to Congress.

Mr. H. S. Haines, Vice-president of the American Railway Association (predecessor to the Association of American Railroads) stated the issue succinctly in testimony during the 1892 hearings:

> I understand the tendency of the legislation to be of a most laudable character and one in which we are entirely in accord, and that is that this committee desires to consider the proposed bills before them with reference to the safety of the men who use these couplers. That is the aspect of the case to which I propose to refer—the possibilities of legislation. *It is not a question as to whether we should have a uniform coupler or not. The question is whether we shall have that kind of a coupler which will protect men's lives and protect them from personal injury, and that is the yardstick that is to be applied to all proposed legislation.*

Id. (Emphasis Added).

As Mr. H. S. Haines further testified:

> What we all want . . . and what this committee wants is a coupler which can be used without danger to the life or to the limb of the man who manipulated it.
>
> . . . .
>
> What the man who manipulates the coupler wants is that every coupler, shall have what we call the release rod, that controls the locking device, so arranged that he can stand *outside* of that car and operate it.

Id. at 41. (Emphasis Added).

The Senate floor debate adds further clarification:

> A railroad employee . . . is asked to step inside the track, stand up against a car which is not moving,

> and watch the coming of another car, which is being pushed steadily up against the car near which he stands. . . . I doubt whether there is a Senator here who can stand deliberately and see a long train coupled in the way the coupling is now done without turning his eyes away as two cars come together just before it is the duty of the car-coupler to make the connection and then get out of the way . . . *This bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars.*

24 Cong. Rec. 1280 (1893). (Emphasis Added).

The couplers today are engineered significantly better than existed in 1893 when the SAA was enacted. Congress at the time was interested in eradicating the loss of life and injuries resulting from couplers failing to couple automatically for any reason. This is the only way employees would be fully protected and certainly what Congress intended. To carve out an exception to the protection of employees 102 years later we submit would be unconscionable.

The railroad argues that all activities of a person going between cars is not prohibited by the SAA. (Pet. Br. 12, 14-17). For example, employees may go between the cars and make air connections. (Pet. Br. 14-15). The Petitioner fails to recognize that the air hose connection may be performed only after the coupling of the cars has occurred. There is no risk of train movements after the coupling occurs, and therefore it is safe and not prohibited for the employee to go between the cars to couple the air hoses. Also, the inspection of cars by employees, other than train or yard crews, may occur only while there is protection against any movement of a car. See 49 U.S.C. § 20131 and 49 C.F.R. Part 218, Subpart B. Moreover, it is immaterial that there exist situations whereby employees go between cars pursuant to other sections of the

various railroad safety laws. The issue here is solely whether or not an employee may go between cars for purposes of the process of coupling and uncoupling. The answer clearly is no, irrespective of what an employee may do in other types of railroad operations. The railroad states that unless the Federal Railroad Administration's regulations are invalid, the SAA does not bar the operation of going between the cars. (Pet. Br. 17). That, of course, begs the question whether or not the referred to regulations violate the SAA. That issue is not before the Court in this case. The Respondent is unaware of any court decision, other than *United Transportation Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983), which analyzed the legality of a procedure authorized by the Federal Railroad Administration whereby an employee was required to place at least part of his body between the cars. It involved the use of a hook by an employee standing outside the ends of cars to open knuckles. It was noted there that the device markedly reduced the need for manual alignments after failed couplings. In that case the court recognized that the FRA regulation may not be violated, but an action could still lie for injuries sustained in performing the manual preparation, because the cars failed to couple automatically. *Id.* at 236 fn. 6. Therefore, as reasoned in *Lewis*, a violation of the SAA does not necessarily mean that a FRA regulation issued pursuant to the SAA is violated.

In the *Lewis* case, 711 F.2d at 245-248, the panel, in which Justice Ginsburg was a member, provided a detailed analysis of the legislative history. It concluded that there was nothing in the legislative history which might demonstrate that Congress also intended to regulate operating procedures or make it unlawful for men to go between cars. *Id.* at 247. Further, the panel focused on the House Report which stated:

> It is the judgment of this committee that all cars and locomotives should be equipped with automatic

> couplers, obviating the necessity of men going between the cars . . .

H.R. Rep. No. 1678, *supra* at 3.

That court reasoned that *obviating the necessity* can only modify the kind of couplers with which cars and locomotives shall be equipped. 711 F.2d at 248. Even the court in *Lewis* acknowledged that the intent of Congress was to prevent the need for men to go entirely between the tracks in order to effect a coupling or uncoupling. *Id.* at 243 fn. 28.

That decision turned on whether the statement *without the necessity of men going between the ends of the car* was descriptive of the equipment, or whether § 2 contained an independent prohibition of the act of going between the cars. The court held that it was descriptive of the equipment and does not address operating procedures. *Id.* at 245. Nevertheless, the court stated that:

> While an action [would lie] for any injuries sustained in performing the manual preparation, because cars have failed to couple automatically, . . . this does not make the coupler "defective" within the meaning of FRA *regulations* . . .

Id. at 236 fn. 6.

Also, the court said that, although there is no separate prohibition for the act of going between the cars, the railroad is still liable because if the employee must go between the cars to effect a coupling, then there has been a "failure to provide equipment that functions as the statute commands". *Id.* at 251. The court further clarified the above statement in footnote 39 at p. 251 as follows:

> . . . .
>
> At the same time, however, *actual failure* to couple automatically because of a misaligned drawbar or a closed coupler is sufficient to establish liability under Section 2. See *Metcalfe v. Atchison, Topeka &*

> *Santa Fe Ry., supra,* 491 F.2d at 896 and cases cited therein. This is because Congress imposed on railroads a duty not just to provide proper equipment, but also to *guarantee its performance.* See *Affolder v. New York, Chicago & St. Louis R.R.,* 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950); *Carter v. Atlanta & St. Andrews Bay R.R.,* 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236 (1949); *Delk v. St. Louis & San Francisco Ry.,* 220 U.S. 580, 31 S.Ct. 617, 55 L.Ed. 590 (1911). And FRA continues to adhere to this view of the railroad's responsibility. . . .[7]

III. THE COURT'S ANALYSIS OF THE SAA CONFIRMS THAT IT IS NOT NECESSARY TO PROVE A DEFECT EXISTS IN THE COUPLER TO ESTABLISH A VIOLATION

The Court has reviewed § 2 of the SAA a limited number of times. In each case it upheld the basic purpose of the Act, to protect an employee from having to go between cars to assist in coupling or uncoupling. Section 2 merely describes the type of coupler which must be used. That is one which performs in such a way that it can be coupled and uncoupled without the necessity of persons going between the cars. As stated by this Court on several occasions, the *condition* of the equipment is not the issue. Rather, it is whether the couplers *performed* as required by the SAA.

---

[7] The Petitioner's reliance on the FRA's rulemakings which were not issued pursuant to the Safety Appliance Acts is misplaced. (See Pet. Br. 15-17). The fact that a railroad complies with one FRA regulation does not automatically mean that the railroad has complied with a Federal statute covering a different subject matter. The FRA regulations referred to by the railroad were promulgated pursuant to the Federal Railroad Safety Act, not the SAA. (See 48 Fed. Reg. 45272, 45274 (1983); 49 Fed. Reg. 6495, 6497 (1984); and 58 Fed. Reg. 43287, 43292 (1993), where the FRA cites its authority for issuing the regulations).

The two concepts which emerge from the Court's analysis of § 2 of the SAA are:

1. If the equipment failed to perform as required by the statute, this in and of itself is an actionable wrong.

2. Section 2 mandates that the couplers *perform* as required, and the *condition* of the coupler is irrelevant in determining whether a violation has occurred. Any requirement that a coupler must be properly set as a precondition to liability recognizes that such an act can be accomplished outside the cars without the necessity of a person going between them.

In *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. at 99, the Court held that a car which failed to perform properly in a switching operation was a violation of the Act. The only way a carrier could avoid liability is if the coupler had not been properly opened. *Id.* The Court pointed out that the plaintiff did not have to show a bad condition of the coupler. *Id.* at 98. It said:

> In [*O'Donnell v. Elgin, Joliet & Eastern R. Co.*,] we held that the Plaintiff did not have to show a "bad" condition of the coupler; she was entitled to a peremptory instruction that to equip a car with a coupler which failed to perform properly "in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and neither evidence of negligence nor of diligence and care was to be considered on the question of this liability." Further, we said, "a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong . . ." *Id* at 99.

The Petitioner relies on both *Atlantic City R.R. v. Parker*, 242 U.S. 56 (1916) and *San Antonio & A.P.R.R. v. Wagner*, 241 U.S. 476, to argue that, before there can

be a violation of the SAA, the railroad should be allowed to prove the drawbar was not defective and/or not properly adjusted by the crew and, furthermore, it is a jury question. (Pet. Br. 19-20).[8]

The *Wagner* case does not support the railroad's contention. In *Wagner* the employee was standing upon the foot board of an engine, between the engine and car, and was attempting to shove the knuckle of the engine's coupler so as to bring it into proper position to make the coupling. He lost his balance, slipped and fell, and his left foot was caught between the couplers and crushed. The railroad argued that cars must have sufficient lateral motion to permit trains to negotiate curves, and that no coupler will couple automatically at all times without previous adjustment, because of the lateral play necessary to enable coupled cars to round curves. The Court held that the jury could reasonably find that the misalignment of the drawbar was greater than required to permit the rounding of curves, or, if not, that an adjusting lever should have been provided.[9]

---

[8] It is significant to note that the strategy of the railroad in this Court is different from its arguments presented below. In the lower courts the railroad argued that the injured employee must show a defect or bad condition in order for a misalignment to violate the SAA. (See Brief and Appendix of Defendant Norfolk and Western Railway Company in the Appellate Court of Illinois, Fifth Judicial District at pp. 13-14.). Here, the Petitioner is now stating that it should be allowed to present a defense that its equipment was non defective and not set properly.

[9] Regarding Petitioner's argument that whether or not a violation exists is a jury question, obviously depends upon whether or not there were sufficient facts for a jury to consider. In this case, the Petitioner only offered testimony that the equipment was not defective upon examination after the accident. The fact that an appliance worked efficiently both before and after the occasion in question is irrelevant. See *Myers v. Reading Co.*, 331 U.S. 477, 483 (1947). Furthermore, in its offer of proof it did not assert, and indeed it could not, that the equipment was improperly set by the plaintiff.

In *Parker* an employee was injured while reaching in to straighten a drawbar. There, the railroad's primary defense was that the SAA did not apply to a coupling made on a curve because no device existed which could align the drawbar from outside the car. The railroad further contended that there needs to be a showing of a defect in the equipment or of negligence on its part before there can be liability under the SAA. The Court specifically addressed both points and concluded that, if the couplers do not couple automatically by impact, nothing else needs to be considered.

> If there was evidence that the railroad failed to furnish such "couplers coupling automatically by impact" as the statute requires (*Johnson v. Southern Pacific Co.*, 196 U.S., 1, 18, 19), nothing else needs to be considered. We are of opinion that there was enough evidence to go to the jury upon that point. No doubt there are arguments that the jury should have decided the other way. Some lateral play must be allowed to drawheads, and further, the car was on a curve, which of course would tend to throw the coupler out of line. But the jury were warranted in finding that the curve was so slight as not to affect the case and in regarding the track as for this purpose a straight line. If couplers failed to couple automatically upon a straight track it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law *Chicago, Burlington & Quincy Railroad Co. v. United States*, 220 U.S. 559, 571. *Chicago, Rock Island & Pacific Ry. Co. v. Brown*, 229 U.S. 317, 320, 321. *San Antonio & Arkansas Pass Ry. Co. v. Wagner*, 241 U.S. 476, 484.

Id. at 59.

Moreover, in *Parker* the facts indicate that the attempted coupling was made on a curve.[10] Both *Parker* and *Wagner* were decided on the ground that the failure of the coupler to work sustains the claim for negligence and/or negligence *per se*. "If this Act is violated, the question of negligence in the general sense of want of care is immaterial." *Parker*, 241 U.S. at 484.

The Court, in its 1949-1950 decisions, noted that there may be possible confusion from the earlier cases. In *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430, 433-434 (1949), the Court held that the absence of a defect cannot aid the railroad if the coupler was properly set and failed to couple. The railroad argued that a coupler which did not function properly should not violate the SAA because the plaintiff had not demonstrated that a defect existed in the coupler. The Court said:

> This Court has repeatedly attempted to make clear that this is an absolute duty not based upon negligence, and that the *absence of a 'defect' cannot aid the railroad* if the coupler was properly set and failed to couple on the occasion in question. (Emphasis Added).

Regarding proof of negligence, in *O'Donnell* the Court stated:

> The arguments and instruction in this case, as well as others, in the language of many opinions and texts reflect widespread confusion as to the effect to be accorded a violation of the Federal Safety statute. [citing *Wagner*]. Part of this confusion is traceable to the diversity of judicial opinion concerning the

[10] Here, the Petitioner, in an offer of proof, proffered testimony only that the car in question was pulled on a curve or slope. (J.A. 24). That testimony did not state what the attorney for Petitioner represented to the judge. The Petitioner has concluded from this that the uncoupling "must have taken place on a curve." (Pet. Br. 6).

> consequences attributed in negligence actions to the violation of a statute.

338 U.S. at 389.

In O'Donnell, 338 U.S. at 393, the Court said that evidence of defect added nothing to a claim under SAA, because it was the failure of the equipment to perform as Congress mandated which was violative of the Act.

> For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence [Citations omitted]. . . . The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous. *Brady v. Terminal Railroad Ass'n of St. Louis,* 303 U.S. 10, 15.

Id. at 390-391.

The Petitioner argues that it need not develop technology to align drawbars automatically (Pet. Br. 22-23). The Court addressed this point in *O'Donnell* and said:

> But the Act certainly requires equipment that will withstand the stress and strain of all ordinary operations, grade, loadings, stops and starts, including emergency stops. A defendant cannot escape liability for a coupler's inadequacy by showing that too much was demanded of it, nor by showing that while the coupler broke it had been properly manufactured, diligently inspected and showed no visible defect. These circumstances do go to the question of negligence; but, even if a railroad should explain away its negligence, that is not enough to explain the way its liability if it has violated the Act.[11]

[11] This Court noted 338 U.S. at 391 fn. 7, that there are circumstances in which a railroad may defend against a failed coupler because of an intervening and independent cause other than its inadequacies or defectiveness. It gave examples of the work of a saboteur, or where a coupler failed to hold because it was improperly set. The Court discussed the latter situation in *Affolder,* 339 U.S. at 96, and it also follows from the reasoning in the above quoted portion in *O'Donnell* that the condition of couplers in ordinary operations, such as curves, grades, loadings, etc. are not defenses to a violation of § 2 of the SAA.

Id. at 393-394; See also *Affolder,* 339 U.S. at 95-96; *Carter,* 338 U.S. at 433-434.

In addition to *O'Donnell,* the Court in both *Carter* and *Affolder* eliminated all requirements of negligence or fault in establishing a violation of the SAA. These cases recognize that negligence would be improperly introduced into the cases if the railroad could defend against a violation of the SAA by evidence of alleged reasons why the coupling would not occur in a particular set of circumstances.

In *Johnson v. Southern Pacific R.R.,* 196 U.S. 1 (1904), a plaintiff in the process of straightening a drawbar, was injured because the couplers on the two cars to be joined were not compatible with one another. The Court noted:

> The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.

Id. at 16-17.

. . . .

> The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically.

Id. at 19.

. . . .

> The essential degree of uniformity was secured by providing that the couplings must couple automatically by impact without the necessity of men going between the ends of the cars.

Id. at 20.

The Petitioner, in its brief, at 21-24 contends that the misalignment in the present case was caused by the normal movement of the railroad car and not by any defect or malfunctioning of the equipment. It offers various reasons why a misaligned drawbar occurs in cases where the equipment is not defective. For example, it states that drawbars often become misaligned by normal jarring and vibrations, the drawbars traversing a curved track must have some lateral play, and that the proper alignment can only be accomplished by the employee going between the rails to move the drawbar manually. (Pet. Br. 22). The Petitioner argues that since the above is the result of normal train operations, this should not make a misalignment a violation of the SAA. The railroad contends that it should not be required to develop new technology to keep the drawbars in proper alignment. We submit this is completely inconsistent with the language of the statute, the intent of Congress, and decisions of the Court. Congress did not concern itself with how the railroads would comply with the statutory requirement, but only that the employees be protected in the coupling and uncoupling operations.[12] An employee can

[12] As stated by the report of the House Committee on Interstate and Foreign Commerce "The demand of railway employees for the protection of the law came to us with great force as we recognized that they could not to any great extent guard against the casualties to which they were exposed; *they must face the danger while others determined the conditions under which they labor.*" H.R. Rep. 1678 *supra* at p. 2. (Emphasis added). Congress intended to, and did, eliminate the hazardous burden placed upon the employes in coupling and uncoupling operations by the adoption of Section 2.

open a knuckle without going between cars, but he/she cannot align a drawbar without doing so. It was appropriate for the Court in *Affolder* to conclude that liability under the SAA existed so long as the coupler was placed in a position to operate, because the equipment permits the uncoupling to occur by use of an uncoupling lever without the necessity of an employee going between the cars. From the railroad's argument here, it appears that the railroad is suggesting that an uncoupling lever was not necessary. We submit that the Court would not have imposed the condition that the coupler be placed in an open position if the device were not present to prevent the employee from going between the cars. The industry had an obligation to develop a mechanism for automatic realignment of a drawbar, or railroads assume the risk that if an employee is injured in the process of attempting to manually realign the equipment, the SAA would be violated.[13]

[13] The Respondent agrees with the statement of the Petitioner (Pet. Br. 24-25) that it should not make a difference as to the railroad's liability whether or not first there must be a failed attempt to couple, rather than relying on the judgment of an employee that the drawbar is too slued to couple, and then the employee is injured during the process of alignment in each instance. In the former example, the requirement to first make an attempt at a coupling and fail would be a useless act, and could in fact damage equipment. It should be noted that in the lower court, the Petitioner argued that a failed coupling or impact must first occur before the SAA is violated. See Brief and Appendix of Defendant Norfolk and Western Railway Company in the Appellate Court of Illinois, Fifth Judicial District at pp. 16-17.

CONCLUSION

For all the reasons stated herein, the decision of the judgment of the Appellate Court of Illinois should be affirmed.

Respectfully submitted,

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December 8, 1995

(8)

No. 95-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial District

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In its opening brief, using the traditional methods of statutory construction, petitioner demonstrated that 49 U.S.C. § 20302(a)(1)(A) plainly does not impose liability on a railroad for a back injury incurred by an employee while aligning a drawbar that is not defective. Respondent, who ignores the statutory text completely in favor of arguing that as a matter of policy the employee must always recover for injuries if he is standing between two cars, has failed to justify his sweeping extension of the SAA. Accordingly, the judgment of the court below should be reversed.

Respondent's broad theories of liability under § 20302 of the SAA clash with a reasonable reading of the plain language of the statute, its legislative history, applicable regulations, and this Court's precedents. A railroad need not develop automatic realigning technology for drawbars in order to avoid strict liability for employee injuries at-

tributable in any way to drawbar misalignment. When an employee is injured going between two cars to straighten a misaligned drawbar, it should be a complete defense to liability under the SAA that the railroad's coupling equipment was not defective. Alternatively, the issue might be whether the railroad in any way acted negligently and, if so, whether the employee was contributorily negligent. But that issue arises only under the Federal Employers Liability Act ("FELA"), which respondent did not raise in this case.

1. The Plain Language Of § 20302(a)(1)(A) Focuses On Safety Equipment And Does Not Bar Employees From Going Between Two Railcars.

While respondent focuses intently on legislative history and broad statutory purpose as the means of interpreting the SAA, he neglects the first principle of statutory interpretation. In a brief with almost as many block quotations as pages, respondent noticeably fails to quote the relevant statutory language. The plain language of the statute focuses on the equipment a railroad carrier must have installed on its cars: "[A] railroad carrier may use or allow to be used on any of its railroad lines . . . a vehicle only if it is *equipped with* . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . . ." 49 U.S.C. § 20302(a)(1)(A) (emphasis added). Even the Act's title refers to safety *appliances*, not safety operations.

This statute does not describe operating procedures, and pointedly does not outlaw employees performing tasks between two cars. The relevant statutory language focuses on safety equipment, not on the operating procedures of coupling and uncoupling. In 1893, when the SAA was enacted, the process of coupling and uncoupling cars was performed by employees standing between two moving cars, and thus Congress described that process in § 20302 in explaining what equipment was mandated. There is no

explicit or implicit prohibition in the statutory words against the simple act of going between two cars.

2. The SAA's Legislative History Establishes That Congress Did Not Intend To Prohibit Employees From Going Between Two Cars, But Instead Intended To Improve The Equipment Installed On Railcars.

Respondent relies unpersuasively on limited materials in the SAA's legislative history to argue that the statute absolutely bars employees from going between cars "for purposes of the process of coupling and uncoupling," Resp. Br. 17, making railroads liable for any injury incurred by employees going between cars during this "process."

The SAA's legislative history demonstrates that Congress was fundamentally concerned about requiring that certain safety equipment be installed on railcars. Congress was not addressing operating procedures, and did not intend to bar employees from going between two cars to perform their duties. Instead, Congress deliberated on what type of equipment would reduce the need to go between cars routinely and thereby decrease the number of railroad casualties. See, *e.g.*, 24 Cong. Rec. 1248 (1893) (statement of Sen. Gorman); 24 Cong. Rec. 1275 (1893) (statement of Sen. Cullom). For that reason, Congress decided that couplers should be automatic and nationally uniform. H.R. Rep. No. 1678, 52d Cong., 1st Sess. 3 (1892); S. Rep. No. 1049, 52d Cong., 1st Sess. 4, 5 (1892).

Congress was particularly concerned about the danger arising out of nonuniform equipment when employees actually coupled and uncoupled the cars. Resp. Br. 6, 13 (citing H.R. Rep. No. 1678, 52d Cong., 1st Sess. 3 (1892)). The exchange from the Senate hearings which respondent quotes supports this point: The Chairman of the Senate Interstate Commerce Committee asked if, upon passage of the bill, there will be "any necessity for a

switchman *to go between the cars at all in order to couple or uncouple the cars,*" and the bill's author stated that there will not be. Resp. Br. 14 (quoting S. Rep. No. 1049, 52d Cong., 1st Sess. 14 (1892)) (emphasis in original and added). The House report called coupling and uncoupling "the chief danger" faced by railroad employees. H.R. Rep. No. 1678, 52d Cong., 1st Sess. 3 (1892).

As explained in the opening brief, Congress expressed particular concern about employees standing between two moving cars as they were being coupled or uncoupled. See 49 U.S.C. § 20302(a)(1)(A); see also 24 Cong. Rec. 1280 (1893); 24 Cong. Rec. 1367 (1893). This situation was extraordinarily dangerous and many employees lost their lives because cars lacked safe coupling equipment prior to passage of the SAA. Congress was not concerned about employees standing between two stationary cars *preparing* them for coupling. Thus, the legislative history focuses on the risk of employees being crushed between two moving railcars, not on the risk of a back injury when aligning a nondefective drawbar when the railcars stood still, several lengths apart, which is the situation here.[1]

Nevertheless, respondent asserts that "Congress intended to eliminate the dangers attendant to working between

[1] The case respondent cites to show that § 20302 applies to more than coupling and uncoupling, Resp. Br. 11 (citing *Coray* v. *Southern Pac. Co.*, 335 U.S. 520 (1949)), is inapposite. That case centers on brakes, not drawbars, and *defective* brakes at that, in extending a railroad's duty of care to an employee injured by a moving train. There is no mention of coupling and uncoupling, and, indeed, the Court stressed that "[l]iability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited *defective equipment* . . . ." 335 U.S. at 523 (emphasis added). In the case at bar, petitioner's railcars were equipped with *nondefective* equipment of the type required by the SAA. Absent a violation of the SAA or a claim of negligence under the FELA, there is no basis for imposing liability on the railroad.

cars, and it didn't matter whether or not the equipment was defective. These dangers are what Congress addressed, not the type of equipment used to accomplish the mandate." Resp. Br. 4. But, to the contrary, Congress's concern in the *Safety Appliance Act* was on what equipment was needed: it declared in the statute that cars "must be *equipped with*" automatic couplers. 49 U.S.C. § 20302(a)(1) (emphasis added). This language caused the railroad industry to change from myriad styles of link-and-pin and automatic couplers to uniform, automatic couplers. See Pet. Br. 3-5.

Congress has also enacted 49 U.S.C. § 20131, directing the Secretary of Transportation to prescribe regulations for the safety of railroad employees who "have to work on, under, or between [rolling] equipment." The existence of this provision, which respondent and his *amicus* simply chose not to reconcile with their expansive interpretation of § 20302, demonstrates that Congress did not intend, as respondent repeatedly asserts, to make it a violation of the SAA for employees to go between two cars.

3. FRA Regulations Plainly Envision Employees Going Between Cars To Perform Their Jobs, Reflecting Congressional Intent To Regulate Equipment, Not Operations.

Consistent with the manifest expectation that employees would go between cars, the Federal Railway Administration's ("FRA") regulations envision employees going between two cars to adjust couplers. See 49 C.F.R. §§ 218.22, 218.39(a).[2] The FRA's understanding embodied in these regulations—that employees would go between two railroad cars—is inconsistent with liability for railroads under the SAA for injuries to employees who have gone between cars to prepare for coupling.

[2] Although these regulations technically reference the Federal Railroad Safety Act and not the SAA, the Secretary of Transportation is responsible for regulations "for every area of railroad safety." 49 U.S.C. § 20103.

Respondent answers that "a violation of the SAA does not necessarily mean that a FRA regulation issued pursuant to the SAA is violated." Resp. Br. 17. But this odd contention is entirely beside the point. Petitioner's argument is that the existence of certain FRA regulations demonstrates that operations requiring an employee to go between two cars are not *per se* impermissible. Pet. Br. 15-17.[3]

4. This Court's Decisions Interpreting § 20302(a)(1)(A), Particularly *Affolder*, Show That A Railroad Has A Good Defense To Liability When An Employee Is Injured Realigning A Nondefective Drawbar.

Respondent misinterprets this Court's precedents under § 20302(a)(1)(A), as holding that employees may not go between two cars to prepare couplers for coupling. He argues that, under this Court's cases, the requirement that a coupler be properly set demands that setting the coupler must be performed without an employee going between the cars.[4]

Respondent's arguments must fail in light of *Affolder*, which holds that a railroad cannot be held *per se* liable

[3] In *United Transportation Union* v. *Lewis*, 711 F.2d 233 (D.C. Cir. 1983), the D.C. Circuit upheld an FRA regulation. In a footnote the court observed that, while a coupler may not be defective "within the meaning of FRA *regulations*," a railroad may still be liable for injuries sustained in manually preparing it for coupling. *Id.* at 236 n.6 (emphasis in original). In the abstract, petitioner has no quarrel with that statement. If the railroad is negligent and the employee is injured, then there could be liability. But if there is no violation of the regulation, there would be no *strict* liability.

[4] Under respondent's theory, presumably an employee who was injured while standing between two cars opening a coupler, even though he could have done so from outside the cars, would be entitled to recover under the SAA. This result makes apparent the arbitrariness of making liability under an equipment statute turn on the employee's location. The better rule—and the rule mandated by the statute—is to focus solely on the equipment itself.

for an employee injury if the coupling mechanism was not "properly set" and had no chance to couple. *Affolder* v. *New York, Chicago & St. L.R.R.*, 339 U.S. 96, 99 (1950); *id.* at 101 (Jackson, J., dissenting). Respondent is simply wrong to state that, "[i]f the couplers do not couple automatically by impact (*for whatever reason*, whether defective or not) . . . then Section 2 of the SAA is violated." Resp. Br. 4 (emphasis added). *Affolder* makes clear that, if the coupler was not "placed in a position to operate on impact," the railroad has "a good defense." *Affolder*, 339 U.S. at 99.

This Court in *Affolder* did not, explictly or implicitly, limit this principle to placing a coupler in a position to couple automatically only by an employee standing outside the car. This Court made no distinction between going between cars or not; it merely required that the coupling mechanism be "properly set." In that case, a knuckle was closed, or not "properly set," and in this case a drawbar was misaligned, or not "properly set." *Affolder* thus properly limits liability under the SAA to matters that involve flawed equipment, which the SAA outlaws, and did not discuss operating procedures. The coupler here was not flawed, and, therefore, recovery under the SAA is not available.

"Properly set" means set so that cars can couple; it does not mean set so that cars can couple as long as no one had to go between the cars to prepare them for coupling. This Court simply made no such distinction in *Affolder*. Further, "properly set" does not just mean that one or both knuckles are open. United Transportation Union ("UTU") *Amicus* Br. 9. Cars are also not properly set to couple if their drawbars are misaligned; the cars will not couple together on impact. If a car had derailed, the coupler would again not be "properly set" to couple, but there would surely not be strict liability under § 20302 of the SAA for injuries incurred by employees going between two cars to retrieve the derailed car.

Liability to employees under the SAA "springs from its being made unlawful to use cars not equipped as required —not from the position the employee may be in or the work which he may be doing . . . ." *Louisville & Nashville R.R.* v. *Layton*, 243 U.S. 617, 621 (1917). This Court's precedents, particularly *Affolder*, demonstrate that, if a railroad shows that its coupling equipment was nondefective, that will defeat a claim under § 20302 of the SAA. This Court's cases pointedly do *not* suggest that, if an employee goes between two cars to align a drawbar in preparation for coupling, the railroad will be liable for any injury incurred.

Respondent and its *amicus* maintain that a railroad employee must not be forced to prove a coupler was defective in order to recover under the SAA for injuries incurred while manually moving a drawbar. Resp. Br. 5, 6, 8, 11-13, 20; UTU *Amicus* Br. 4, 7-8. Petitioner is not arguing that a railroad employee specifically must prove a "defect" in his prima facie case. But ultimately he must prove a violation of the SAA. And certainly a railroad should be able to show that the coupler was merely misaligned in a manner that does no violence to the SAA. Pet. Br. 19-20.

Thus, although a railroad employee need not prove a defect in order to recover any more than he must show the coupler was open, a railroad at a minimum should be able to demonstrate the lack of such a defect as a defense. Respondent argues that there was "not one word in the hearings, the Congressional reports, nor the Congressional floor debate to the effect that the coupler must be defective before a violation exists." Resp. Br. 6-7, 12.[5] However, if a railroad's coupling mechanism is just what is called for by the statute and regulations, without any

[5] In fact, respondent's broad statement is incorrect. *See* 24 Cong. Rec. 1277 (1893) (statement of Sen. Hunton) ("[I]f the machinery used by the railroad company is defective, and that *by reason of the use of that defective machinery* [an] accident occurs by which a passenger or employe[e] is killed or wounded, the railroad company is responsible.") (emphasis added).

defect or abnormality, the railroad should not be held *strictly* liable for injuries incurred by employees working with the mechanism. If a coupler was not "placed in a position to operate on impact," the railroad has "a good defense." *Affolder* v. *New York, Chicago & St. L.R.R.*, 339 U.S. 96, 99 (1950). Accordingly, where, as here, it is undisputed that the railroad's coupling mechanism was not defective—it was merely out of alignment—there is no basis for imposing strict liability. Instead, the burden should be on the employee to show that the railroad was in some way negligent, a burden respondent steadfastly refused to shoulder by choosing not to sue under the FELA.

The UTU argues that a "mechanically perfect coupler which fails to perform as required violates the Act." UTU *Amicus* Br. 4. This cannot be the rule after *Affolder*; that is precisely what happened in that case and this Court held that the railroad had a good defense. Such a result is the only sensible one: A nondefective or "mechanically perfect" coupler, by definition, performs as the SAA requires and complies with the Association of American Railroads ("AAR") guidelines.

Finally, contrary to respondent's argument, Resp. Br. 20-23, *Atlantic City R.R.* v. *Parker*, 242 U.S. 56 (1916), and *San Antonio & Aransas Pass Ry.* v. *Wagner*, 241 U.S. 476 (1916), demonstrate that a misaligned drawbar is not *per se* a violation of the SAA. Although on the facts in those cases this Court found that a jury could infer that the drawbars had too much lateral play and were defective, it notably did not hold that as a matter of law the railroads were liable under the SAA.

Ultimately, this Court has found that a railroad cannot be held strictly liable under the SAA if the coupling mechanism was not set properly and had no chance to couple. *Affolder*, 339 U.S. at 99. The railroad has a "good defense" in such a case. *Id.* This is such a case.

5. Section 20302 Does Not Cover Injuries Incurred When Aligning A Drawbar Where The Railroad Had Non-defective Coupling Equipment In Place.

As a practical matter, drawbars must be in alignment for automatic coupling to occur on impact. Drawbars may occasionally become misaligned due to normal movement of railcars, because of the lateral play necessary to avoid cars derailing on curves. Realignment can only be accomplished by a railroad employee going between the rails to align the drawbars manually.

Respondent declares, in a novel argument, that the SAA required railroads, in 1893, to develop self-aligning drawbars. Resp. Br. 24, 26-27; UTU *Amicus* Br. 17. As respondent's *amicus* concedes, "[c]ertainly, the act of going between the ends of railroad cars could not be prohibited, otherwise railroad movement would come to a grinding halt since there is no other procedure for realigning drawbars." UTU *Amicus* Br. 12; Resp. Br. 3. Nevertheless, respondent argues that railroads must assume any risk of injury to employees straightening drawbars if they are not utilizing devices that will align drawbars automatically.

In fact, § 20302(a)(1)(A) of the SAA does not require railroads to develop self-aligning devices. The SAA requires automatic *coupling*, not automatic *realignment*: "[A] railroad carrier may use or allow to be used on any of its railroad lines . . . a vehicle only if it is equipped with . . . couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles . . . ." 49 U.S.C. § 20302(a)(1)(A). The purpose of this section is to ensure that coupling devices will function on contact so that employees need not perform the dangerous task of going between moving cars to couple (or uncouple) them manually.[6] The industry had no responsi-

[6] The UTU suggests that petitioner has proposed a change in the law. UTU *Amicus* Br. 16. In fact, it is respondent who seeks

bility to develop such devices, contrary to respondent's suggestion, Resp. Br. 9, because these devices were not required by the statute.

Respondent and *amicus* each alleges, without any supporting citations, that railcars and drawbars are now made longer than in 1893 and thus drawbar misalignment has increased since passage of the SAA. Resp. Br. 3; UTU *Amicus* Br. 16-17. It does not follow from these assertions that the SAA requires railcars to be equipped with self-aligning drawbars. Congress could have dealt with this situation if it had felt there was a substantial danger to railroad employees, or the UTU could have requested that the FRA promulgate such a rule just as it—along with the AAR—requested that the FRA promulgate 49 C.F.R. § 218.39. See 49 Fed. Reg. 6495 (1984). Neither has happened.

Moreover, if this Court believed that the SAA mandated the development of automatic self-aligning devices for drawbars, it has had the opportunity to make that interpretation clear and has not so construed the statute.[7]

to change the law after over a century to force railroads to develop technology to align drawbars.

The UTU also makes it a point to note that Congress refused to change Section 2 in 1970. UTU *Amicus* Br. 13-14, 17. However, Congress also did not change Section 2 when it recodified the SAA in 1994, and the modern trend of federal circuit cases holding that there is no SAA violation if a misaligned drawbar is nondefective had begun at that time. *See Reed* v. *Philadelphia, Bethlehem & New Eng. R.R.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado* v. *Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *cf. United Transp. Union* v. *Lewis*, 711 F.2d 233 (D.C. Cir. 1983). When it last amended the SAA, Congress expresly declared that it did not intend to make any "substantive change in the law" nor did it mean to "impair the precedent value of earlier judicial decisions and other interpretations." H.R. Rep. No. 180, 103d Cong., 2d Sess. 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 822.

[7] As a component of the Department of Transportation, the Federal Railway Administration has long been empowered to insist

For example, in *Atlantic City R.R.* v. *Parker*, 242 U.S. 56, 59 (1916), the employee plaintiff was injured aligning a drawbar in preparation for a coupling attempt. This Court held that "there was enough evidence to go to the jury" on the question of whether the railroad had furnished couplers as required by the statute. *Id.* This holding, over 20 years after passage of the SAA, precludes respondent's argument that the SAA compels railroads to have self-aligning drawbars. If it was for the jury to decide in *Parker* what amount of lateral play was acceptable, then it follows that *some* amount of lateral play *is* acceptable and drawbars need not be aligned at all times.

Drawbars become misaligned due to necessary lateral play and normal movement of the railcars; they are not thereby defective. They remain in compliance with the SAA, which does not require automatic realignment.

6. The SAA Does Not Provide A Remedy For Every Railroad Employee Injury, But Employees Will Not Be Deprived Of A Remedy If This Court Construes The SAA Not To Cover Respondent's Claim.

Respondent and the UTU repeatedly emphasize that the purpose of the SAA is the protection of railroad employees, Resp. Br. 6, 12-13, 26; UTU *Amicus* Br. 2, 5, and suggest that, if the defense that the equipment was not defective were available in cases like the one here, then the statutory purpose will be defeated. The UTU stresses Congress's implicit policy determination in enacting the SAA that the railroad industry should bear the risks of hazardous but essential railroad duties. UTU *Amicus* Br. 2.

To be sure, the Safety Appliance Act was enacted to protect railroad employees. Resp. Br. 13, 14-17; *Lilly* v. *Grand Trunk W.R.R.*, 317 U.S. 481, 486 (1943). Nevertheless, the SAA does not automatically provide a remedy for all injuries suffered by railroad employees. Otherwise, the FELA would be rendered largely meaningless.

on the development of self-aligning devices if the safety hazards warranted such a requirement. 49 U.S.C. § 20103.

While the SAA aims to protect employees from harm caused by defective safety appliances, it does not follow, as respondent implies, that railroads are insurers of all injuries their employees incur, particularly where railroads have fully complied with the law. Resp. Br. 4. For the most part, proof of railroad negligence is required because the railroad has no cap on liability for recoveries by its employees. See AAR *Amicus* Br. 2 n.1. In sum, general arguments based on notions of "fundamental fairness" may have emotional force for policymakers, UTU *Amicus* Br. 5, 6, but they do not provide a basis for imposing liability in the face of specific statutory language to the contrary.

Adopting petitioner's interpretation will not "carv[e] out an exception to the protection of employees 102 years" after passage of the SAA. Resp. Br. 16. Nor is it accurate to argue that "[t]he health and welfare of [the UTU's] members and their families would be seriously undermined" upon acceptance of petitioner's position. UTU *Amicus* Br. 17. Respondent here sued only under the SAA,[8] thus electing *not* to seek recovery on any theory of petitioner's negligence available to respondent under the FELA. Such a choice was presumably made to avoid the introduction of evidence of contributory negligence that is permissible under the FELA. 45 U.S.C. § 53.

The UTU is incorrect in stating that "Petitioner . . . seeks to eliminate Safety Applicance Act compensation

[8] Strictly speaking, there is no private cause of action under the SAA. *See Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969). Plaintiff's complaint was technically deficient in premising liability solely on the Safety Appliance Act without reference to the FELA.

for those injuries and deaths" caused while adjusting couplers on railcars which were moving or moved unexpectedly. UTU *Amicus* Br. 3. Respondent is similarly incorrect in declaring that "the only way employees would be fully protected," Resp. Br. 16, would be to bar employees from going between cars for "the process of coupling and uncoupling," presumably including preparation that involves the alignment of drawbars. *Id.* at 17. Employees will continue to receive compensation for "injuries inflicted as a result of the Act's violation." *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949). More importantly, these employees unquestionably retain the option of suing for negligence under the FELA.

* * * *

At the end of the day, the accident in this case—a back injury sustained attempting to move a piece of equipment —was not caused by an equipment malfunction or defect, which is necessary to invoke strict liability under the SAA. Respondent's injury is squarely covered by the FELA, but that statute requires employees to prove negligence and it allows railroads to assert contributory negligence as a basis for reducing damages. This Court should not distort the balanced scheme embodied in the SAA and the FELA and allow recovery where it is not required by the plain language of 49 U.S.C. § 20302(a)(1)(A), as conclusively interpreted by this Court in *Affolder*.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, this Court should reverse the judgment on the verdict and remand to the Appellate Court of Illinois, Fifth Judicial District.

Respectfully submitted,

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December 28, 1995

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No. 95-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,
v.
WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Fifth Judicial District**

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 per-

cent of the rail industry's line haul mileage and produce 94 percent of its freight revenues. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in the United States, Congress structured this tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated, leaving the railroad industry virtually the only one where work-related injuries are compensated under a fault-based system.[1]

Each year thousands of claims and lawsuits are asserted under FELA against AAR members. In recent years, FELA costs have risen to over $1 billion a year, far more than is spent by private industry in general in payment of compensation to injured employees.[2]

[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems. Unlike workers' compensation, which caps benefits, U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS 22-25, Chart VI (1994), FELA does not limit the amount of damages that may be collected when a railroad is liable. A FELA verdict will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

[2] For the past four years, the major railroads have spent between $1.2 and 1.3 billion on FELA annually, or nearly 4 per cent of their gross revenues. ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (Calendar years 1991, 1992, 1993, 1994) ("CLAIM & LITIGATION REPORT"). Private industry other than railroads pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRACK'S LONG-TERM VIABILITY 59 (1995), whereas railroads pay over $2.00. 1994 CLAIM & LITIGATION REPORT, at 2-2.

AAR has a strong interest in this case because the ruling below would result in a further enlargement of the scope of FELA liability. This case concerns the interpretation of the Safety Appliance Act, an equipment statute; under FELA, violation of such a statute can constitute negligence *per se*. *Urie v. Thompson*, 337 U.S. 163, 189 (1949); *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U.S. 384, 390 (1949).[3]

AAR has a long standing expertise in railroad operational issues, particularly the issue presented in the case at bar, the operation of couplers. For over one hundred years, AAR, or its predecessor organizations, have studied coupling operations, the means by which individual rail cars are linked to form a train. For example, the Master Car-Builders' Association (MCBA), an AAR predecessor organization, focussed on the issue as early as 1887. MCBA concluded then that "[r]ailroads have reached a point where there is an absolute need for an automatic train coupler; . . . The public demands it; safety of the trainmen demands it; and the economical operation of railroads demands it."[4]

The expertise of the American Railway Association (ARA), another AAR predecessor organization, was recognized by Congress when it enacted the Safety Appliance Act in 1893. That law directed ARA to designate to the Interstate Commerce Commission the standard height of drawbars on freight cars. Act of March 2,

[3] Moreover, if such a statute is violated the railroad may not introduce evidence that the employee's negligence contributed to the injury, which ordinarily would serve to reduce any judgment in proportion to the contributory negligence. 45 U.S.C. § 53.

[4] *See*, Report of the Proceedings of the Twenty-First Annual Convention of the Master Car-Builders' Association, June 14-16, 1887, 187, at 195 (Report of the Executive Committee on Automatic Freight Couplers). The Association was engaged in the evaluation and testing of various types of couplers in an effort to recommend a particular type for universal use.

1893, c. 196, § 5, 27 Stat. 531. Congress has continued to rely on the expertise of AAR in railroad operational issues.[5]

In addition to expanding railroad liability, the ruling below would make operational demands on railroads that, for technological reasons, cannot be met.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

ARGUMENT

I. THE RULING BELOW MISCONSTRUES THE PURPOSE OF THE SAFETY APPLIANCE ACT AND WOULD IMPOSE A TECHNOLOGICALLY IMPOSSIBLE BURDEN ON RAILROADS

Section 2 of the Safety Appliance Act (SAA) was enacted to assure that coupling devices on rail cars will function on contract with each other (or the locomotive) so as to avoid the necessity for employees to go between moving cars to couple them manually.[6] This process is called automatic coupling.

Today, all rail cars are equipped with automatic couplers. However, even couplers that are in perfect working order will from time to time become misaligned due

[5] Recently Congress authorized the Secretary of Transportation to use AAR's services in carrying out his duties with regard to power and train brakes. 49 U.S.C. § 20302(e).

[6] 24 Cong. Rec. 1275 (1893). *See infra* pp. 6-8. Now codified at 49 U.S.C. § 20302(a), in pertinent part this provision reads:

> [A] railroad carrier may use or allow to be used on any of its railroad lines—
>
> (1) a vehicle only if it is equipped with—
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

to the horizontal play of the drawbar required to permit the rounding of curves without derailment.[7]

The court below held that SAA holds a railroad is liable as a matter of law if an employee is injured while going between rail cars to align a drawbar for coupling. Since the court prohibited the railroad from introducing evidence that the coupler was not defective, the ruling essentially makes misalignment negligence *per se*.

The result is contrary to the intent of Congress in both SAA and FELA. Moreover, it ignores the realities of railroad operations and the state of rail technology. To uphold the court below would force railroads to abandon existing technology completely for an alternative that does not exist, and that certainly did not exist in 1893 when SAA was enacted. Congress never intended to present the industry with an operating impossibility.

A. Congress Enacted The Safety Applicance Act To Ameliorate The Hazard Posed To Rail Employees From Going Between Cars During The Coupling Operation

For this Court fully to appreciate the error below, some historical background is useful. Inherent in the concept of a train is that individual railroad cars can be assembled together (i.e., coupled) to travel a designated route. At the end of the route, the cars can be reassembled in different configurations for other destinations. In the United States, where origins and destinations spanned great distances and involved numerous rail companies, the growth and success of the technology required ease and uniform-

[7] *See infra* notes 14-15 and accompanying text. Federal Railroad Administration regulations recognize that couplers must contain sufficient lateral play to prevent "fouling on curves." 49 C.F.R. Part 215.125. For the purposes of this brief, the terms "couplers," "drawbars" and "knuckles" are used by AAR as they are described in the Statement of the Case in Petitioner's Brief.

ity of such interchange. Obviously then, the efficiency of the coupling procedure has always been of critical importance.

As railroads built the nation's commercial network, there was a human toll. In the normal course of operations, rail employees were required to go between cars and perform coupling operations manually. This required standing between two cars as one moved toward the other. In the early days, several hundred employees were killed each year while coupling cars.[8]

During the last decade of the Nineteenth Century, Congress focused its attention on the perils of railroad work, and in particular the danger inherent in what was then the typical manner in which rail cars were connected. The high rate of death and injury resulting from this practice led Congress to enact section 2 of SAA, which, after a date certain, made it unlawful:

> for any . . . common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars.[9]

By this act, Congress sought to change the existing practice to the extent it required employees to go between rail cars and attempt to couple them as one car moved toward the other. As the legislative history explains:

[8] 24 Cong. Rec. 1275 (1893). The act of coupling alone accounted for about 15 per cent of all rail employee fatalities. *Id.*

[9] This Court ruled that the statute should be read as though there were a comma after the word "uncoupled" so that the words "without the necessity of men going between the ends of cars" applies to the acts of both coupling and uncoupling. *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 18-19 (1904). For many years found at 45 U.S.C. § 2, section 2 has been recodified at 45 U.S.C. § 20302(a). *Supra* note 6.

> A railroad employee . . . is asked to step inside the track, stand up against a car which is not moving, and watch the coming of another car, which is being pushed steadily up against the car near which he stands.

24 Cong. Rec. 1280 (1893). This practice was necessitated because, at that time, many rail cars were not equipped with couplers that coupled automatically on impact. Moreover, even in the case of cars equipped with so-called automatic couplers, because of the lack of uniformity, coupling generally could not be accomplished without requiring an employee to go between the cars: automatic couplers that were not compatible still had to be coupled manually.

SAA, therefore, required that rail cars be equipped with automatic couplers, and that all couplers be sufficiently compatible so they would couple upon impact. *Johnson*, at 16-17.[10] Technology was not an inhibiting factor.

Section 2 of SAA must be interpreted in the context of its original purpose. While it prohibits employees from going between cars to effect the actual coupling of cars, it does not prohibit other activities, including preparations that are necessary to permit cars to be coupled. The statute does not prohibit, nor was it intended to prohibit, employees from going in between cars to prepare knuckles or drawbars for coupling, operations that can and do take place while the cars are stationary. As the legislative history makes clear, these activities were not what concerned Congress:

> . . . very few people have lost their lives by coupling inventions [sic] between cars when they are at a

[10] The legislative history explained that "[t]he bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between cars." 24 Cong. Rec. 1280 (1893). It was left to the railroads to reach consensus on what type of couplers to use to ensure compatibility.

> standstill, but it is the continuous shifting and moving of cars in which the brakeman is expected to do the work under circumstances of great danger.

24 Cong. Rec. 1367.[11]

This Court has previously recognized that SAA does not impose an absolute ban on employees going between cars, only a ban on employees going between cars to perform the act of coupling the cars. *Affolder v. N.Y., C. & St. L. R. Co.*, 339 U.S. 96 (1950).[12] The same conclusion was reached after a comprehensive and careful review of the legislative history of SAA by the Court of Appeals for the District of Columbia in *United Tranp. Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983), which found "that the scope of Section 2 is confined to the requirement that railroad cars be 'equipped' with automatic couplers that can be operated without the necessity of men going between the ends of the cars, and . . . that the statute does not separately prohibit the act of going between cars." *Id.* at 251.[13] The *Lewis* court pointed out that

[11] Any suggestion that SAA was meant to bar any operation requiring employees to go between cars is further belied by the explicit recognition by Congress that the connection of air hoses (essential for braking), which might require employees to go between cars, would continue. 24 Cong. Rec. 1367.

The most recent decision by a federal court of appeals on this issue, *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994), also recognized this important point: "Although workers must go between the cars to realign even non-defective drawbars, the danger in doing so does not come from the situation against which the FSAA seeks to safeguard (workers having to go between railroad cars moving together); the danger here is outside § 2's contemplated scope." 33 F.3d at 575.

[12] In *Affolder*, the Court ruled that if the coupler failed to couple because the knuckle had not been opened, there would be no violation of the act. 339 U.S. at 99.

[13] The *Lewis* case did not involve a personal injury suit, but rather, a challenge by a rail union to a ruling by the Federal Railroad Administration that a procedure employed by a railroad that required employees partially to go between cars did not violate SAA.

SAA did not address operating procedures, and that if it was read as a blanket prohibition against going between cars during coupling operations, it would render it impossible to couple cars. *Id.* at 245. Since the *Lewis* decision, the other federal courts of appeals considering the issue have recognized that the purpose of SAA is to require that cars be equipped with automatic couplers in working order, not to prohibit employees from going between cars to perform activities other than coupling. *See, Kavorkian; Lisek v. Norfolk & Western Ry. Co.*, 30 F.3d 823 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Reed v. Philadelphia, Bethlehem & New England R.*, 939 F.2d 128 (3d Cir. 1991).

B. Drawbars Must Be Realigned From Time To Time And The Practice Cannot Be Outlawed

The decision below ignores a fundamental aspect of railroad operations. In order for rail cars to operate on curved track there must be some degree of play in the coupler unit.[14] A rigid coupling mechanism would result in derailments. Thus, lateral play in drawbars is a fact of railroad life. A corollary fact is that coupler units, even in working order, may occasionally move out of line to the point where they will not couple on impact unless realigned.[15]

[14] *See*, ASSOCIATION OF AMERICAN RAILROADS, MANUAL OF STANDARDS AND RECOMMENDED PRACTICES, Section C-II, Specifications For Design, Fabrication And Construction of Freight Cars, M-1001, § 2.1.6 (1994). ["MANUAL OF STANDARDS AND RECOMMENDED PRACTICES"]

[15] Federal courts that have considered this matter have reached the same conclusion. *Lisek, supra* ("[I]t is uncontested for the purposes of this case that nondefective coupling mechanisms can, through the normal course of railyard operations, become misaligned to an extent that they will not couple without preliminary realignment." 30 F.3d at 831); *Kavorkian, supra* ("[A] drawbar frequently becomes misaligned by the normal jarring and vibrations of the railroad car or when the car is uncoupled on a different

The railroad industry is constantly alert to technogical changes dealing with both interchangeability and the need to keep couplers in alignment. In furtherance of this goal, AAR has promulgated a set of mechanical rules for freight cars, known as the Interchange Rules. The specific mechanical standards referenced in the Rules are published by AAR in the "Manual of Standards and Recommended Practices."

Among other things, the Rules prescribe what types of couplers may be used to ensure interchangeability among cars.[16] In addition, the amount of lateral play needed in drawbars so that rail cars of various sizes can safely round curves is specified.[17] These specifications are derived from mathematical formulae relating to the length of cars and track curvature.

A satisfactory technology to address drawbar misalignment has yet to emerge. Efforts to develop technology that would cause couplers to realign automatically have been attempted. Self centering devices for couplers were introduced in the mid-1960's and were used for a time in

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track, to such a degree that coupling can not occur without realignment." 33 F.3d at 575).

In *Clark v. Kentucky & Indiana Terminal R.*, 728 F.2d 307 (6th Cir. 1984), the Court opined, in dicta, that the lateral play needed to round curves would not cause a drawbar to become misaligned, and that a coupler in need of realignment in order to effect coupling was necessarily defective. This simply is not factually correct, and *Kavorkian*, acknowledging this point, rejected this aspect of the *Clark* ruling. 33 F.3d at 575.

[16] MANUAL OF STANDARDS AND RECOMMENDED PRACTICES, Section B, Coupler and Freight Car Draft Components, M-211 (1994). In 1916, ARA adopted the Type D coupler as a standard. This was the first coupler in which parts provided by all manufacturers were completely interchangeable. In subsequent years, new designs were adopted by ARA, and later AAR. *See*, CAR AND LOCOMOTIVE CYCLOPEDIA S8-1 (3rd ed. 1974).

[17] MANUAL OF STANDARDS AND RECOMMENDED PRACTICES, M-1001. *supra* note 14.

limited circumstances.[18] AAR undertook extensive evaluation of these devices. These investigations revealed problems with the devices that were not addressed in a satisfactory manner.[19] As a result, such devices eventually fell into disuse and are not used by railroads today.

Thus, the need for manually realigning drawbars that have moved off center is, and will continue to be, an integral part of railroad operations. SAA ought not be interpreted as converting a common and unavoidable practice into a violation of the law.[20]

There is no conflict between SAA and the practical needs of railroad operations, and this Court should establish a rule that is consistent with both. Where an employee can show an injury caused by the failure of a coupler to couple automatically on impact, and no cause other than a defect or malfunction of the coupler can be attributed, there would be a violation of SAA, and liability would be established. However, where an injury occurs when an employee goes between a car to perform

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[18] The *Lewis* court noted this experimental use. 711 F.2d at 235 n. 5.

[19] *See e.g.*, Letter from J.A. Angold, Director Technical Research and Development, Atchison, Topeka & Santa Fe Railway Co. to AAR Coupler and Draft Gear Committee members (Sept. 16, 1968) (reporting that an investigation on his railroad revealed that 28 of 38 of a particular coupler centering device installed were found to be inoperative.); Letter from W.A. Faris, Asst. Manager Power and Equipment-Car to C.L. Davidson, Secretary, AAR Mechanical Division (Dec. 23, 1968) (reporting that an investigation on his railroad revealed that only 34.8% of the cars with a particular coupler centering device installed had operative devices.) (Letters are on file at the office of Amicus, 50 F Street, N.W., Washington, D.C. 20001.)

[20] To do so would render railroads insurers of their employees' safety in circumstances never contemplated by SAA or FELA. As this Court recently reaffirmed, "FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis for his liability is his negligence, not the fact that injuries occur." *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, at 2404 (1994).

a task preparatory to coupling, or where the railroad can show that failure to couple was the result of a cause other than a defect in or malfunction of the equipment, SAA would not be violated. In this situation, the employee could still offer evidence that the injury resulted from the carrier's negligence; however, a ruling of negligence *per se* would be inappropriate.

Whether an unsuccessful attempt to couple had been made prior to an injury should not be determinative of whether SAA has been violated.[21] Otherwise, two situations where a nondefective coupler becomes misaligned in the course of normal rail operations could lead to different results, solely based on an employee's initial estimation of whether a drawbar is properly aligned. For example, where an employee notices a misaligned drawbar, attempts to couple it and is injured, no SAA violation would occur, and negligence would need to be shown in order to recover. However, a different result would obtain where an employee does not notice the drawbar is misaligned, and attempts, unsuccessfully, to couple the cars. If the employee then attempted to align the drawbar now perceived to have been misaligned and is injured, a finding of an SAA violation, and negligence *per se*, would follow if a failed attempt to couple were determinative.

By ignoring clear intent of SAA, and the majority of federal court decisions, and finding SAA applicable in cases where there was no defect in or malfunction of the coupling device, the court below has expanded the notion of strict liability under FELA and shifted the balance in FELA prescribed by Congress.[22] In expanding railroad liability, the court below improperly made a public policy decision. An argument can be made that

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[21] The *Lisek* court questioned whether a prior unsuccessful attempt at coupling would trigger liability. 30 F.3d at 831, n. 15.

[22] While proof of negligence is a prerequisite for recovery under FELA, damages are uncapped. *See supra* note 1.

the rail industry should be treated like all others in that strict liability ought to obtain for workplace injuries.[23] However, this is an argument that must be made to the Congress.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the judgment of the Appellate Court of Illinois in this case be reversed.

Respectfully submitted,

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November 9, 1995

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[23] *See*, Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79 (winter 1992). This Court has questioned the wisdom of FELA but has recognized that it is within Congress' province to make any change. *See e.g., Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 354 (1943); *Urie v. Thompson*, 337 U.S. at 196 (Frankfurter, J. concurring in part).

FOR ARGUMENT

No. 95-6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

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BRIEF OF THE UNITED TRANSPORTATION UNION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE UNITED TRANSPORTATION UNION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief of the United Transportation Union is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

The United Transportation Union is a voluntary labor organization representing railroad transportation employees on every major railroad in the United States. On a daily basis railroad workers put their own safety at risk, and rely on the protection of the Federal Employers Li-

ability Act and the Federal Safety Appliance Act. These Acts are vital to the ability of these workers to safely and efficiently perform their duties. The United Transportation Union fully supports the arguments presented on behalf of the plaintiff-respondent, William J. Hiles, and urges this Court to affirm the decision of the Illinois Appellate Court below. Although the decision by this Court is important to Mr. Hiles, it has even greater significance for the thousands of railroad workers in the United States who form the life blood of our railway system.

The language of the Safety Appliance Act, Title 45 U.S.C. Section 2[1] and the key judicial opinions interpreting the Act are discussed later in this brief as well as the briefs filed by the parties to this Appeal. Lost in the debate, however, is any reference to the one, overriding issue that prompted Congress to enact the Safety Appliance Act in 1893. That is, who should bear the risks and the burdens of performing certain jobs that are hazardous, but essential to the operation of a railroad? Congress conclusively answered this question in 1893 by deciding, as a matter of public policy, that the risks and burdens of performing certain hazardous operations should be borne by the railroad industry, not by those unfortunate few individuals who happen to be injured while performing their assigned duties. In 1946, this Court specifically recognized and sanctioned the public policy decision made by Congress in 1893, finding that Congress created the Safety Appliance Act to equitably allocate the inevitable costs of human injury associated with the railroad industry. *Uric v. Thompson*, 337 U.S. 163 (1946).

Nevertheless, the AAR and its member railroads seek to have this Court do for them what they have been unable to persuade Congress to do, that is to effectively repeal Section 2 of the Safety Appliance Act or turn it into a product liability statute. The AAR brief expresses apparent dismay over their claim that its member railroads spend approximately 4% of their gross revenues on "FELA". Nowhere is it claimed that this expenditure is related primarily to coupler cases as opposed to all injury claims. In fact, statistics show a human cost. According to Federal Railroad Administration records, in 1994 there were 31 rail deaths nationwide. Of those, 2 deaths were trainmen (a class of employees overwhelmingly represented by the United Transportation Union) killed while adjusting couplers on railcars which were moving or moved unexpectedly. *Accident/Incident Bulletin No. 163, Calendar Year 1994, U.S. Department of Transportation*, Tables 8, 9, 66 and 67. Petitioner not only seeks judicial approval of the practice, but seeks to eliminate Safety Appliance Act compensation for those injuries and deaths. Petitioner would impose a potential 100% *loss* of "revenues" to those surviving widows and children. Furthermore, suffice it to say that no decision of this Court or any court has premised an interpretation of the Safety Appliance Act on the claimed economic burden of such safety laws upon a defendant. Indeed, if such claims had merit, Congress is the body to which this concern should be addressed.

[1] The Safety Appliance Act (hereinafter SAA) was originally codified at Title 45 U.S.C. Sections 1-16. Section 2 is currently codified at Title 49 U.S.C. Section 20302(a)(1)(A). For purposes of clarity, the citations in this Brief are to the original code sections.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Respondent's brief.

SUMMARY OF ARGUMENT

A. Section 2 of the Safety Appliance Act requires Couplers Which Perform as Described by the Plain Language of the Act

The Safety Appliance Act requires railroads to use cars which couple automatically upon impact without the necessity of railroad employees going between the ends

of the railroad cars. 45 U.S.C. Section 2. The Act requires *performance* on the occasion in question. Petitioner and the Association of American Railroads contend that an injured employee must prove a defect in order to establish a violation of the Safety Appliance Act and that the "properly set" requirement extends to manual adjustment of couplers and drawbars between the ends of cars. Such an interpretation is *directly contrary* to United States Supreme Court decisions holding that the condition of the equipment is immaterial and further is contrary to the plain language of the Act because railroad employees would be required to go between the ends of railroad cars to realign the couplers in order to effectuate a coupling.

The phrase "without the necessity of men going between the ends of the cars" is descriptive of the equipment and the manner in which that equipment is to perform. The statute requires performance—not flawless components. A mechanically perfect coupler which fails to perform as required violates the Act. The absence of a defect cannot aid the railroad. *Carter v. Atlantic & St. Andrews Bay Ry. Co.*, 338 U.S. 430 (1949).

B. Prior Rulings of This Court Have Been Consistent With the Plain Language of Section 2 of the Safety Appliance Act

The arguments of Petitioner, if adopted, would require this Court to overrule or ignore clear, fundamental rulings in earlier cases arising under Section 2 of the Safety Appliance Act, 45 U.S.C. Section 2. [See *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 99 (1950); *Carter v. Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430 (1949); *O'Donnell v. Elgin, Joliet & E. R. Co.*, 338 U.S. 384 at 390 (1949)]

The first and most important concept is that the plain words of the statute mandate the equipment to *perform* as required.

Second, the *failure to perform* as required by the Act *is the actionable wrong.*

Third, *all issues of negligence* or fault based analysis have been *eliminated.*

Fourth, the *condition of the equipment*, bad or good, the absence of a defect, or the fact that it worked on other occasions, *is immaterial.*

This Court has recognized one defense to the Safety Appliance Act. That is, if the failure to couple is caused by *a knuckle* not being properly opened, the plaintiff's claim for damages will be defeated. *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 99 (1950). This defense is consistent with the plain words of the Act since the knuckle of the coupler can be opened without the necessity of men going between the ends of the cars. When railroad employees are required to go between railroad cars in order to manually re-align a drawbar, they face an entirely different situation than they do when it is necessary to open a railroad knuckle in order to effectuate a coupling. The pivotal difference between these two activities is the fact that the coupler or knuckle can be opened or "set" *without the need for the employee to go between the ends of the cars*, while realignment of a drawbar requires employees to go between the ends of railroad cars.

C. The Same Policy Considerations That Existed When Section 2 of the Safety Appliance Act Was Drafted Still Exist Today

Congress has determined that certain railroad activities are so hazardous, and so far beyond the control of the individual worker, that any employee who is injured or killed while engaged in one of these activities should be entitled to compensation, regardless of fault. The process of preparing to couple and uncouple cars is one of those activities. The foundation for this public policy decision is basic, fundamental fairness. The Safety Appliance Act,

unlike the FELA, is not a fault-based statute. It is a performance only statute. Proof that a coupling mechanism was or was not defective is immaterial under the Safety Appliance Act. The only question is whether the coupling mechanism performed as required by the Act, that is, without the necessity of individuals going between the end of the cars. Our members, railroad working men and women, who are constantly exposed to the risks of the coupling process are entitled to no less than the fundamental fairness that the Safety Appliance Act provides as evidenced by the plain language of that Act and the clear legislative purpose and intent expressed by Congress.

ARGUMENT

I. THE COURT SHOULD RE-AFFIRM ITS PRIOR DECISIONS WHICH HAVE BEEN CONSISTENT WITH THE PLAIN LANGUAGE OF SECTION 2 OF THE SAFETY APPLIANCE ACT

As early as 1904, this Court held that the phrase "without the necessity of men going between the ends of the cars" applies equally to coupling and uncoupling. *Johnson v. Southern Pacific R.R.*, 196 U.S. 1 (1904). Or, as the Circuit Court of Appeals in *United Transportation Union v. Lewis*, 711 F.2d 233, 244 (D.C. Cir. 1983) stated: "a licit coupler is one which can be coupled and uncoupled without men having to go between the ends of the cars."

This Court ". . . early swept all the issues of negligence out of cases under the Safety Appliance Act. . . A *failure of equipment to perform* as required by the [Safety Appliance Act] is in itself an actionable wrong, *in no way dependent upon negligence* and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence . . . The statutory liability is not based upon the carrier's negligence." *O'Donnell v. Elgin, Joliet & E. R. Co.*, 338 U.S. 384 at 390 (1949). In *Carter v. Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430 (1949) the Court stated:

> This Court has repeatedly attempted to make clear that this is an *absolute duty not based upon negligence*, and that absence of a defect cannot aid the railroad if the coupler was properly set and failed to couple on the occasion in question . . . The fact the coupler functioned properly on other occasions is immaterial.

Id. at 433-434. (Emphasis added).

Furthermore, under the Safety Appliance Act a plaintiff does not have to prove why the couplers failed to couple automatically or that the couplers were defective or in bad condition. This Court, referring to the *O'Donnell* decision, stated in *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 99 (1950):

> The plaintiff did not have to show a 'bad' condition of the coupler; she was entitled to a peremptory instruction that to equip a car with a coupler which failed to perform properly "in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability".

Id. at 99, quoting *O'Donnell v. Elgin, Joliet & E. R. Co.*, 338 U.S. 384 at 394 (1949).

Indeed, *in O'Donnell*, this Court rejected the opinion of the lower court that as a result of the broken coupler the "jury may. . . infer that the coupler was defective and was furnished in violation of the Act." *O'Donnell*, 338 U.S. at 386-387. Instead, this Court ordered a peremptory instruction that a coupler which broke in the switching operation was a violation of the Act.

In *O'Donnell*, the defendant railroad also sought to avoid liability by arguing that the coupling failed concurrently with an emergency stop. The Court noted such evidence "might be material on the question of negligence. But the [Safety Appliance Act] certainly requires

equipment *that will withstand the stress and strain of all ordinary operation, grades, loading, stops and starts, including emergency stops.* A defendant cannot escape liability for a coupler's inadequacy by showing too much was demanded of it . . ." *Id.* at 393 (Emphasis added).

The *O'Donnell* Court realized that to permit the railroad any excuses based on the manner or circumstances of the coupling operation is to reintroduce negligence into the case. It would effectively gut the Safety Apliance Act of its "absolute duty". Likewise, in the case before this Court, the Petitioner railroad seeks to excuse its compliance if the car has been on a curve or if employees can attest to its good or non-defective condition. These negligence or fault-based excuses are eliminated by the Act. The *Affolder* decision plainly stated: "Nor do we think that any question regarding the normal efficiency of the couplers is involved in an action under the Safety Appliance Acts". *Id.* at 98. Petitioner suggests that the plain words of the Act be ignored simply because normal non-defective drawbars may go out of alignment during normal operations. Yet the normal efficiency of this equipment *is not* a consideration under the Act.

Certain core concepts emerged from this Court's 1949-1950 trio of Section 2 cases, *Carter, O'Donnell,* and *Affolder*. The statute commands a particular performance of the equipment. Failure to perform as required is the "actionable wrong." All issues of negligence or fault-based analysis are eliminated. The "condition" of the equipment is immaterial. It makes no difference that the coupler worked perfectly before and after the occasion in question; whether it was defective or not or in a bad or good condition.

Petitioner's argument and analysis in this case fails because it rejects these core concepts. It seeks excuses to explain why employees must go between the cars to effect a coupling by arguing that "properly set" should be construed to include manual alignment between the

ends of the cars. However, the term "properly set" was defined by the Court in *Affolder* to mean only that one or both of the knuckles are open—an act which can be accomplished *without the necessity of the employee being between the ends of the cars.* The "properly set" defense does not apply to adjustments between the ends of the cars. This is the only possible conclusion consistent with the plain language of the Safety Appliance Act and the Court's decision in *Affolder*. Indeed, if Petitioner's position were upheld, there would be no reason to equip cars with an operating lever which opens knuckles or uncouples cars from *outside the cars.* The same flawed rationale which claims manual preparation of the drawbar between the cars is not a violation, would apply equally to manual preparation of the knuckle (to couple or uncouple) while between the cars.

It is important to remember that this Court has ruled that Section 2 of the Safety Appliance Act is an absolute liability statute, not a product liability statute. The design and operating characteristics of the coupling mechanism are deliberately left to the railroad industry. As the Congressional record relating to the passage of the Safety Appliance Act clearly states:

> This bill does *not* require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars.

24 Cong. Rec. 1280 (1893) (emphasis added). Section 2 mandates performance characteristics only, *i.e.*, that railcar couplers can be coupled and uncoupled without requiring anyone to go between the cars.

Petitioner's efforts to buttress its argument by its quotations from *Atlantic City R.R. v. Parker*, 242 U.S. 56 (1916) and *San Antonio, etc. R.R. v. Wagner*, 166 S.W. 24, *aff'd*, 241 U.S. 476 (1916) are misplaced. Petitioner draws a conclusion from those cases that a defect or bad condition must be present in order for misalignment to

violate the Safety Appliance Act. Neither case so states. More to the point, in *Parker*, the plaintiff contended that "the failure of a coupler to work at any time sustains a charge of *negligence*". In *Wagner*, the entire Safety Appliance Act analysis is made in the context of *negligence* and *negligence per se*.

The *O'Donnell* court, footnoting the *Wagner* decision as well as several others, stated:

> The arguments and instructions in this case, as well as others, and the language of many opinions and texts reflect widespread confusion as to the effect to be accorded a violation of the federal safety statute. [Footnote to *Wagner*] Part of this confusion is traceable to the diversity of judicial opinion concerning the consequences attributed in negligence actions to the violation of a statute.

O'Donnell, 388 U.S. at 389.

One of the principal themes of the 1949-1950 trio of *O'Donnell*, *Carter* and *Affolder* was to wipe away all forms of negligence or fault based analysis so prevalent and confusing in cases such as *Parker* and *Wagner*.

II. THE FAILURE OF CARS TO COUPLE AUTOMATICALLY UPON IMPACT WITHOUT THE NECESSITY OF INDIVIDUALS TO GO BETWEEN THE CARS IS A VIOLATION OF SECTION 2 OF THE SAFETY APPLIANCE ACT

Until 1991 and the decision in *Reed v. Philadelphia, Bethlehem & N.E.R.R.*, 939 F.2d 128 (3rd Cir. 1991), it had been almost uniformly held that the failure of a coupler to couple automatically upon impact or the need to align a drawbar to make a coupling, which resulted in an injury to an employee was a violation of Section 2.

A. A Misaligned Drawbar, Which Requires Manual Adjustment Between the Cars, Violates Section 2 of the Safety Appliance Act

The early case law as to violations of Section 2 is summarized in *Kansas City S. Ry. v. Cagle*, 229 F.2d 12 (10th Cir. 1955), *cert. denied*, 351 U.S. 908 (1956). In *Cagle*, the drawbar was misaligned before any coupling was attempted. Cagle was injured while attempting to manually align the drawbar. The Court of Appeals stated:

> Appellant states the question in its brief to be, *"Was this one fact that the coupler was out of line a non-compliance with the Act?" We think the answer to this question must be in the affirmative.* A great number of cases have considered the scope and effect of the Coupler Provision of the Federal Safety Appliance Act. Space prevents even a listing of all the cases which have considered these provisions, let alone an analysis thereof. Without exception the cases have held that operating a car on which the drawbar is so far out of line as to prevent automatic coupling violated the Act and imposes absolute liability.

Cagle, 229 F.2d at 14 (Emphasis added).

In *Schaaf v. Chesapeake & Ohio Ry.*, 317 N.W. 2d 679 (Mich. Ct. App. 1982), *cert. denied*, 464 U.S. 848 (1983), a Michigan court in a ruling similar to *Hiles* and other state court decisions stated:

> Defendant fails to cite and our research has not discovered any case holding that drawbars must be properly aligned before a railroad can be found guilty of a violation of the Safety Appliance Act. . . . There is a crucial distinction, however, between a coupler and a drawbar. A coupler can be opened and closed without the necessity of having someone go between any railroad cars. A drawbar, however,

> can only be aligned manually by someone pushing it in while standing between the railroad cars.

Schaaf, 317 N.W.2d at 681.

In *United Transportation Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983), this union sought an order prohibiting the use of a "hook procedure" claiming that the procedure, which required the insertion of the employee's arm between the cars, violated the "without the necessity of men going between the ends of the cars" phrase of Section 2. The decision turned on whether the "without the necessity of men going between the ends of the cars" was descriptive of the equipment or whether Section 2 contained an independent prohibition of the act of going between the cars. The court ruled the phrase was descriptive of the equipment and "does not address operating procedures". *Id.* at 245. Certainly, the act of going between the ends of railroad cars could not be prohibited, otherwise railroad movement would come to a grinding halt since there is no other procedure for realigning drawbars.

The court in *Lewis* explained that even though there is no separate prohibition for the act of going between the cars, the railroad is still *liable* pursuant to Section 2 for injuries which result from the non-performing coupler. Liability exists because if the employee must go between the cars to effect a coupling then there "has been a failure to provide equipment that functions as the Statute commands", *Id.* at 251. In a footnote the *Lewis* court emphasized:

> At the same time, however, *actual failure* to couple automatically because of a misaligned drawbar or a closed coupler is sufficient to establish liability under section 2. *See Metcalfe v. Atchison, Topeka & Santa Fe Rwy., supra*, 491 F.2d at 896 and cases cited therein. This is because Congress imposed on railroads a duty not just to *provide* proper equipment, but also to *guarantee its performance*. *See*

> *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950); *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236 (1949); *Delk v. St. Louis & San Francisco Ry.*, 220 U.S. 580, 31 S.Ct. 617, 55 L.Ed. 590 (1911). And FRA continues to adhere to this view of the railroad's responsibility.

Id. at 251, N. 39.

Thus while the Safety Appliance Act does not address or prohibit operating procedures, it requires coupling equipment that is *proper* and *guarantees its performance*. Significantly, the Federal Railroad Administration, the regulator of rail safety, adheres to this view of the railroad's responsibility. In short, the FRA has encouraged operating procedures which reduce injuries[2] and which reduce the need for manual coupling between the cars. But *Lewis* and the FRA adhere to the view that employees are still entitled to compensation for injuries when they occur due to equipment which fails to perform as required by the Act.

Because the drawbar misalignment here required manual adjustment between the cars, the coupling mechanism was in violation of the Act. By 1970, there was substantial national uniformity that a misaligned drawbar was a violation of Section 2 of the Act. At that point, Congress reevaluated the entire scope of all Federal rail safety laws. The result of that reevaluation was the Federal Railroad Safety Act ("FRSA") of 1970, codified at Title 45 U.S.C. Section 421, *et seq*. The committees which studied the legislation discussed the existing safety statutes, including the Safety Appliance Acts, and noted the effectiveness of the protections afforded by the Safety Appliance Acts.

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[2] Indeed, the FRA, in *UTU v. Lewis* permitted the hook procedure precisely because it increased the likelihood of automatic coupling and decreased the need for employees to go between the cars to manually adjust the drawbars; the precise activity being performed by Respondent Hiles at the time of his injury.

Report of the Committee On Interstate And Foreign Commerce on S. 1933 To Provide for Federal Railroad Safety, Hazardous Materials Control and For Other Purposes, June 16, 1970, House Report No. 91-1194. The Secretary of Transportation proposed repeal of these earlier Federal rail statutes such as the Safety Appliance Acts and proposed that the Department of Transportation continue the protection solely by regulation under this legislation. (i.e. see current FRA regulations contained in 49 C.F.R.) [1970 Cong. Rec. 4109 (1970)]. In fact, there are FRA regulations which relate to couplers, their components, as well as many aspects of railroad operations.

Nevertheless, it was the decision of Congress to retain the Safety Appliance Acts. The Congressional Record states: "These particular laws have served well. In fact, the committee chose to continue them *without change*." *Report of the Committee On Interstate And Foreign Commerce on S. 1933 To Provide for Federal Railroad Safety, Hazardous Materials Control and For Other Purposes*, June 16, 1970, House Report No. 91-1194, page 8 (emphasis added).

B. The Presence or Absence of a "Defect" Is Immaterial Under Section 2 of the Safety Appliance Act

Clearly, Congress intended the continued strict enforcement of the simple, direct words of Section 2. If the equipment fails to perform as required by the Act and an employee is injured, the railroad is liable. The flawed decisions of the lower courts in cases such as *Reed v. Philadelphia, Bethlehem & N.E.R.R.*, 939 F.2d 128 (3rd Cir. 1991), *Goedel v. Norfolk & W. R.R.*, 13 F.3d 807 (4th Cir. 1994), *Kavorkian v. CSX Transportation, Inc.*, 33 F.3d 570 (6th Cir. 1994), and *Lisek v. Norfolk & W. Rwy.*, 30 F.3d 823 (7th Cir. 1994) can be traced largely to a failure to follow the core principles of Section 2. The above cases emphasize the condition of the equipment (i.e. defects) rather than the performance of the

equipment. In each of those cases the existence of a bad or defective condition is either required or somehow incorporated as a defense. Amazingly, Petitioner, in its Brief (at pp. 24-25) rejects one of the central rationales of the *Lisek* decision: that a failed coupling must first occur. Further, these decisions permit manual adjustment between the cars either because Section 2 does not "address operating procedures" (see *United Transportation Union v. Lewis*) or because the Act was meant to protect against moving railcars only.

A review of the Congressional Record prior to the passage of the Safety Appliance Act reveals broad themes only. However, it is clear that Congress did not mandate a specific type or design of coupler—only how it must perform. Nowhere does the Record suggest that the presence or absence of defects in the coupling mechanism was a consideration or component of the Act. Once again, the performance of the equipment, not its condition, is the exclusive focus of the plain words of the Act.

The short answer to the "moving" equipment argument is that the Act makes no such distinction nor is such a distinction drawn in any early cases under the Act. The practical answer is that it makes no difference to railroad employees whether they sustain an injury while moving the drawbar or because the railcar moves while the employee is between the ends of the cars to manually adjust the drawbars. Indeed, the plain language of the Act make no distinction between moving and stationary railcars. Petitioner's arguments would, in essence, rewrite those 100 year old words to say that it must be coupled or uncoupled "without the necessity of men going between the ends of *moving* cars".

UTU agrees here that Section 2 does not prohibit entering between cars by employees. Section 2 describes the type of equipment required and how it must perform. If manual adjustment between the cars is required, the coupler has failed to comply with Section 2. In short, the

equipment violates Section 2—not the employee who makes the adjustment.

III. SECTION 2 OF THE SAFETY APPLIANCE ACT IS VITAL TO THE RAILROAD EMPLOYEE'S ABILITY TO SAFELY PERFORM HIS OR HER DUTIES

The significant question to be asked at this time is why the Court is being asked to "rewrite" an Act of Congress that has successfully reduced injuries and protected the rights of railroad workers for over a century. The United Transportation Union, as amicus curiae, respectfully submits that no changes in technology, railroad operating procedures, or public policy have occurred at any time during the last century which would justify the change in the law that has been proposed by the Petitioner in this appeal. Hazardous job duties still must be done by individual railroad workers.

The size, weight and overall complexity of railcars and trains has increased over the years. Even a slight error in the movement of the equipment, or any failure of the equipment to perform, can cause devastating injuries or death. Every time a railroad employee is required to go between two railroad cars to manually realign a drawbar in order to effectuate a coupling, that employee is at risk of injury or death. This is true regardless of whether the cars are "stationary" at the precise moment the employee goes between them, because said cars are subject to movement at any time by simultaneous railroad operations being undertaken by other railroad employees. There is no way in which it can be guaranteed that railroad cars which are stationary when an employee goes between them to align a drawbar will remain that way for the duration of the time in which the employee must be between the cars to complete the task.

One of the problems of relating drawbar adjustments to Congressional remarks in 1893 is this simple question: Did drawbars "misalign" in 1893 and if so, was it sufficient to prevent automatic coupling without the necessity of men to go between the ends of the car. This question is not a fanciful one. The length and movement of a drawbar is directly related to the size of the railcar, the turning radius of curves, and to some degree the type of drawbar (i.e. cushioning devices that permit it to move in and out). The simple fact is that as railroads built *bigger* (and more profitable) railcars and equipped them with cushioning devices (to prevent *damage* to the goods being transported by those cars) the movement of drawbars from side to side increased and, therefore, the incidence of drawbars being "off center" or misaligned increased. Despite these developments, railroads (see AAR Brief) claim that they are unable to develop "satisfactory" technology for self-centering devices that can be activated without going between the cars. The AAR does not explain what it means by "satisfactory". Perhaps it is too expensive or it is easier to pay injured employees than develop satisfactory technology. Of course, if this Court agrees with Petitioner, no claims payment need be made and the current manually adjusted drawbar will likely be elevated to the level of a "satisfactory" technology.

The Legislative wisdom of Section 2 is that it is as flexible as technology. Railroads have the freedom to develop any form of coupling apparatus as long as it performs as required by the Act. In this Court, the Petitioner and AAR simply state that they cannot or will not develop a coupler or drawbar which can be adjusted *without* individuals going between the cars.

Thus, this Court is asked to interpret Section 2 contrary to its plain language and contrary to prior rulings of this Court, and deny injured railroad workers compensation for injuries resulting from such non-conforming devices. The request is made to this Court by Petitioner despite a refusal by Congress to repeal or change Section 2 in 1970. Petitioner's position should be clearly rejected. The health and welfare of our members and their families would be seriously undermined by any other result.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the judgment of the Appellate Court of Illinois in this case be affirmed.

Respectfully submitted,

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